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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

Jeremiah W. (Jay) Nixon, Attorney General of Missouri, and John Maupin, Chairman, Missouri Ethics Commission, *Petitioners*,

v.

Shrink Missouri Government PAC, a political action committee, W. Bevis Schock and Fredrick T. Dyer, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case is a companion to *Carver v. Nixon*, No. 95-1258 (cert. pending), which also arose from challenges to Missouri's 1994 reform of its campaign finance laws. *Carver* deals with the rights of those who make contributions to campaigns. The first question in this case deals with the use of funds once they are contributed:

1. Whether the First Amendment gives candidates an unfettered right, once they accept contributions during a campaign for one office, to decline to use those funds to speak during that campaign, so as to preclude a state from requiring that candidates return unused funds to contributors.

The second question deals with candidates' overall campaign expenditures:

2. Whether the First Amendment precludes a state from differentiating, in terms of its disclosure requirements and its restrictions on the contributions by corporations, labor unions, and other non-individuals, between candidates who commit themselves to keep total campaign expenditures within defined limits and those who refuse to make that commitment.

PARTIES TO THE PROCEEDING

The parties in this suit are Jeremiah W. (Jay) Nixon, Attorney General of Missouri; John Maupin, Chairman of the Missouri Ethics Commission; Shrink Missouri Government PAC, a political action committee; W. Bevis Schock and Frederick T. Dyer.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Jeremiah W. (Jay) Nixon, Attorney General of Missouri, and John Maupin, Chairman of the Missouri Ethics Commission, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.") at A-1 - A-16) is reported at 71 F.3d 1422. The opinion of the district court (App. at A-17 - A-40) is reported at 892 F. Supp. 1246.

JURISDICTION

The court of appeals entered its judgment on December 19, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States and Sections 130.052, 130.053 and 130.130 of the Revised Statutes of Missouri (App. at A-41 - A-46).

STATEMENT

While addressing Congressional efforts to reform the campaign finance system, this Court in *Buckley v. Valeo*[1] observed that "safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion" must be the primary focus of any campaign finance reform. The claims that candidates have been able to "buy" 1996 presidential primary election victories highlight the continuing need to find innovative methods of safeguarding the integrity of elections. In this case, the court of appeals halted two such innovations, and did so with sweeping conclusions that will preclude further innovations in the very areas of campaign reform where recent events have raised the greatest concerns.

Efforts to reduce the influence of money in politics have been undertaken regularly since the turn of the

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[1] 424 U.S. 1, 58 (1976).

century.[2] Early reform efforts were limited to restricting contributions to candidates from corporations, labor unions, and government employees.[3] Due to the inadequacy of those efforts, particularly demonstrated by the serious abuses arising out of the 1972 presidential elections, Congress and many state legislatures enacted broader reforms. The reform movement began with the federal disclosure requirements, contribution limits, and absolute expenditure limits that this Court reviewed in *Buckley*.

The reforms of the early 1970's did not eliminate the public's perception of corruption or its increasing scepticism concerning electoral and legislative politics. The increased cynicism of the 1990's has brought about a new wave of campaign finance reforms, both by the legislatures and by the people through initiative petition and public vote. In 1994, Missouri undertook reform through both methods. Senate Bill (S.B.) 650 enacted some reforms, including the imposition of limits on contributions to candidates, the creation of voluntary expenditure ceilings, and the enactment of restrictions on the carrying over of political "war chests" from campaign to campaign. Proposition A, an initiative petition passed by a vote of 74% of the citizens of Missouri, contained its own "war chest" provision, as well as the contribution limits that are at issue in *Carver v. Nixon*.

On May 8, 1995, the three respondents filed this suit challenging the constitutionality of several of these reform measures. "Shrink Missouri Government PAC" is a political action committee that contributes to campaigns of

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[2] *See United States v. Auto Workers*, 352 U.S. 567, 575 (1957).

[3] *See id.* at 575-587.

candidates for Missouri offices; W. Bevis Schock and Fredrick Dyer claim that they are candidates for office. They brought this suit against two state officials: John Maupin, Chairman of the Missouri Ethics Commission, and Attorney General Jeremiah W. (Jay) Nixon. On July 7, 1995, the district court issued an order and judgment holding that certain provisions of Missouri's campaign finance law violated the First Amendment rights of the respondents, and entered a permanent injunction against their enforcement.[4] On December 19, 1995, the U.S. Court of Appeals for the Eighth Circuit affirmed the decision of the district court.[5]

Petitioners now seek review of the court of appeals' decisions regarding the state's voluntary expenditure ceilings and its law on carrying forward contributions from one election to another. The court of appeals held that Missouri had compelling state interests for enacting these laws, including its interest in preventing corruption and the appearance of corruption in the campaign process.[6] However, the court found an insufficient nexus between those compelling interests and the means that the General Assembly and the electorate used to address them.[7] It did so with language that was so broad that it will stifle further efforts to attack the problems of the huge increases in campaign expenditures and the carrying over of campaign "war chests" -- an act that inhibits, rather than promotes, political speech.

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[4] App. at A-17.

[5] App. at A-1.

[6] App. at A-9.

[7] App. at A-10.

REASONS FOR GRANTING THE WRIT

I. The states and Congress are inhibited in their efforts to reform campaign finance by the Eighth Circuit's determination that the First Amendment prevents them from differentiating between candidates who are willing to commit themselves to keeping their overall expenditures within reasonable levels and those who are not.

Twenty years ago, in *Buckley*, this Court rejected Congress' decision to place absolute, involuntary dollar limits on expenditures by individual candidates seeking public office.[8] At the same time, this Court affirmed the use of an incentive (in that instance, the allocation of public financing) for voluntary restrictions on overall campaign expenditures.[9] This Court did not opine as to what other, less expensive incentives would be permissible. It certainly did not address the ability of Congress or the states, when requiring campaign finance disclosures or regulating the sources from which contributions could be accepted, to differentiate between those who are willing to keep their expenditures within reasonable limits, and those who are not. In its holding, the Court left enough room for innovation -- but also enough room for the Eighth Circuit to stifle innovation.

Missouri's voluntary expenditure ceilings are one innovative attempt to follow the overall plan endorsed by this Court in *Buckley* (provide incentives rather than impose limits), without slavishly adhering to the federal, public financing model. All candidates for Missouri elected office

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[8] 424 U.S. at 54-57.

[9] *Id.* at 85-108.

must, at the time of declaring their candidacy, file a declaration indicating whether they agree to abide by the limits.[10] The expenditure limits vary according to the office sought, and this initial declaration is wholly voluntary. The state thereafter differentiates in two key respects between the two groups of candidates -- those who make the commitment of reasonableness, and those who do not.

Missouri first differentiates between these two groups by using the oldest of the methods of attacking corruption in politics: restricting the sources of campaign contributions. A candidate who subscribes to the expenditure ceilings (a "subscribing candidate") may accept contributions from all sources, including individuals, corporations, labor unions and political parties. On the other hand, a candidate who elects not to subscribe to these expenditure limits (a "nonsubscribing candidate") may only accept contributions from individuals, and not from political action committees ("PACs"), political parties, unions, corporations, etc.[11]

Restrictions on the sources of campaign contributions are common to many state laws, and to federal law.[12] For example, Connecticut's law restricts contributions to candidates from business entities.[13] Other states prohibit independent expenditures by certain business

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[10] § 130.052.1, Rev. Stat. Mo. (Supp. 1995).

[11] § 130.052.3, Rev. Stat. Mo. (Supp. 1995).

[12] 2 U.S.C. § 441b (1976) (limits contributions or expenditures by banks, corporations and labor organizations).

[13] Conn. Gen. Stat. Ann. § 9-333o (1995).

entities, either against or in support of candidates.[14] Current campaign reform efforts in the states include such restrictions. For example, just last week the Kansas Senate passed a bill that would allow candidates to accept contributions only from individuals and political committees.[15] There are myriad variations on this theme.

Restricting contributions by corporations and other entities is commonplace, and does not pose a constitutional infringement of the First Amendment. Thus, this Court upheld such a restriction in *Austin v. Michigan Chamber of Commerce*.[16] Missouri's law is not extraordinary in terms of the restriction it imposes. But in rejecting that law because of the way in which it differentiates among candidates, the Eighth Circuit has issued a declaration that prevents the states from making any distinction between subscribing and nonsubscribing candidates.

The second area in which Missouri has created a distinction is one with even wider acceptance. This Court in *Buckley* expressly endorsed the use of disclosure requirements.[17] Missouri has long had such requirements. The 1994 change was, again, to create a distinction between campaigns where expenditures are kept within under reasonable ceiling, and those that go beyond that point. Under §§ 130.041 and 130.046, all candidates make their

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[14] *E.g.*, La. Rev. Stat. Ann. § 1505.2 (West 1996).

[15] Kansas Senate Bill 545 (passed Senate March 13, 1996).

[16] 494 U.S. 652 (1990).

[17] 424 U.S. at 66-67.

last pre-election reports seven days before the election, reflecting contributions and expenditures as of ten days before the election.[18] But if a nonsubscribing candidate's expenditures exceed the defined ceilings, then -- and only then -- that candidate must begin filing daily reports.[19]

This district court and court of appeals failed to recognize that this part of the Missouri program is a *disclosure* statute. This Court has observed that disclosure

> allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interest to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.[20]

Disclosure requirements are "the least restrictive means of curbing the evils of campaign ignorance and corruption."[21] Yet the court of appeals has precluded the states from enacting statutes that use this "least restrictive means" as the basis for an incentive to keep campaign expenditures under control.

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[18] All candidates must report last-minute large contributions (now precluded by Missouri's contribution limits). § 130.051, Rev. Stat. Mo. (1994).

[19] § 130.052.3, Rev. Stat. Mo. (Supp. 1995).

[20] *Buckley*, 424 U.S. at 66-67.

[21] *Id.* at 68.

Although the precise approach chosen by Missouri is innovative, the great majority of states have some kind of expenditure ceilings already in place. Some impose only minimal limitations, including prohibiting candidates for state elected office from spending campaign contributions on particular items, and restricting cash expenditures above specified amounts.[22] Other states go a step further. These states offer an incentive to candidates to encourage them to comply with campaign expenditure limits. Most of these states utilize the only incentive the Eighth Circuit would allow: public financing.[23] But even those statutes vary

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[22] Colo. Rev. Stat. § 1-45-112 (1995) (limits certain cash expenditures to $100); Conn. Gen. Stat. Ann. § 9-333o (1995) (limits business contributions and independent expenditures) and § 9-333j (1995) (sets out list of permissible campaign expenditures); Del. Code Ann. 15 § 8020 (1995) (lists "authorized campaign expenditures"); N.M. Stat. Ann. § 1-19-29.1 (1995) (restricts expenditure of campaign funds to specified uses); La. Rev. Stat. Ann. § 18:1505.2 (West 1996) (prohibits certain cash expenditures in excess of $100; also prohibits some independent expenditures by corporations, unions, etc.); S.C. Code Ann. § 8-13-1332 (Law Co-op. 1993) (makes certain types of expenditures unlawful); and Wash. Rev. Code Ann § 42.17.070 (1996) (restricts cash expenditures to $50 under certain circumstances; also restricts which individuals may make campaign expenditures on behalf of a candidate or political committee).

[23] *E.g.*, Id. Code § 34-2502 (1995) (creates election campaign fund); N.J. Rev. Stat. Ann. § 19:44A-35 (West 1996) (limits expenditures from state fund for election campaign expenses); and Wis. Stat. Ann. § 11.50 (West 1995) (creates state election campaign fund).

considerably. For example, some states, like Florida, only apply their ceilings to certain candidates.[24]

Thus Missouri's enactment of voluntary expenditure ceilings is part of a trend that is spreading throughout the country. Those seeking to reform campaign laws in other states now look to the court of appeals' decision in this case, which apparently holds that there can be no voluntary expenditure ceiling unless public financing is the incentive for compliance.[25] In the view of the Eighth Circuit, that is true regardless of the state's compelling interests in enacting the limits, regardless of how narrowly tailored the law is drawn to serve those interests, and regardless of whether the incentives consist of regulations that this Court has said are permissible, such as prohibitions on corporate contributions and the imposition of strict disclosure requirements.

To focus myopically on the presence of public financing in some state and the federal statutes is to ignore the other incentives they contain. Those statutes also

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[24] Fla. Stat. Ann. § 106.34 (1996) (applies ceilings only for candidates for Governor, Lieutenant Governor and Cabinet officer positions). *See also, e.g.*, Tex. Elec. Code Ann. § 253.160, *et seq.* (Vernon 1996) (limits expenditures by judicial candidates); N.C. Gen. Stat. § 163-278.48 (1995) (limits apply only to candidates for Governor); Me. Rev. Stat. Ann. 21 § 1015 (1995) (expenditure limits for state senators and state representatives only); N.H. Rev. Stat. Ann. § 664:5-b (1994) (limits apply to both several state and federal office seekers); and Ky. Rev. Stat. Ann. § 121A.030(1) (Baldwin 1996) (limits apply only to candidates for Governor and Lieutenant Governor).

[25] App. at A-9.

provide for penalties to be imposed on candidates who exceed expenditure limits after they have pledged to abide by them. For example, Nebraska's law requires candidates who exceed the limits by less than five percent to return the public funds they have received.[26] Nebraska also imposes a criminal penalty; if the subscribing candidate exceeds the limits by five percent or more, then that candidate is guilty of a Class II misdemeanor.[27] Many other states, such as Maryland and Michigan, also provide for criminal penalties.[28]

Other variations on voluntary expenditure ceiling laws are found in Hawaii,[29] Kentucky,[30] Massachusetts,[31]

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[26] Neb. Rev. Stat. § 32-1607(2) (West 1996).

[27] Neb. Rev. Stat. § 32-1607(3) (West 1996).

[28] *E.g.*, Md. Elec. Code Ann. § 31-3(c) (1995) (candidate and committee chair/treasurer held jointly and severally liable both civilly and criminally); and Mich. Comp. Laws Ann. § 169.267(3) (West 1996) (candidate guilty of a misdemeanor punishable by fine up to $1,000 or up to ninety days in jail).

[29] Haw. Rev. Stat. § 11-209 (1995).

[30] Ky. Rev. Stat. Ann § 121A.030 (Baldwin 1996).

[31] Mass. Gen. Laws Ann. 55A § 1A (1996).

Minnesota,[32] Texas[33] and Vermont.[34] In Hawaii, candidates who receive public funding are subject to expenditure limits, and are strictly penalized for exceeding those limits.[35] Subscribing candidates who exceed the limits must notify their opponents, their contributors, the election officer and the election commission both by telephone and in writing the same day the expenditure limits are exceeded.[36] This notification requirement is considerably more onerous than the disclosure requirements in Missouri's law that were struck down by the court of appeals.[37]

Kentucky's expenditures limitations law, which was recently upheld by a federal district court,[38] conditions receipt of public funding for candidates for Governor and Lieutenant Governor on the candidates' agreement to abide by the expenditure limits.[39] Both subscribing and

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[32] Minn. Stat. Ann. § 10A.25 (West 1996).

[33] Tex. Elec. Code Ann. § 253.160 (Vernon 1996).

[34] Vt. Stat. Ann. 17 § 2841 (1994).

[35] Haw. Rev. Stat. § 11-209(b) (1995).

[36] Haw. Rev. Stat. § 11-209(b) (1995).

[37] § 130.052.3, Rev. Stat. Mo. (Supp. 1995); *see* App. at A-42.

[38] *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D. Ky. 1995) (state may limit total campaign expenditures for publicly funded candidates).

[39] Ky. Rev. Stat. Ann. § 121A.030(1) (Baldwin 1996).

nonsubscribing candidates can receive up to twenty-five percent of their contributions in any one election from permanent committees.[40] But just as in Missouri, limits on contributions to Kentucky candidates vary in part according to whether those candidates choose to subscribe to the expenditure ceilings. For nonsubscribing candidates, total contributions may not exceed $150,000; subscribing candidates, however, may accept contributions in excess of $150,000.[41]

Massachusetts' law functions much like Kentucky's. All candidates for Massachusetts statewide offices must file statements indicating whether they agree to abide by the state's expenditure limits;[42] in order to receive public financing, a candidate must abide by the limits.[43] If candidates fail to file this statement, then their names do not appear on the ballot.[44] If a candidate does not agree to the expenditure limits but his or her opponents do, then that nonsubscribing candidate must file a statement indicating the maximum amount of expenditures to be made in his or her campaign.[45] Again, a candidate's failure to file this

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[40] Ky. Rev. Stat. Ann. § 121A.030(4) (Baldwin 1996).

[41] Ky. Rev. Stat. Ann. § 121A.030(4) (Baldwin 1996).

[42] Mass. Gen. Laws Ann. 55A § 1A(a) (1996).

[43] Mass. Gen. Laws Ann. 55A § 6 (1996).

[44] Mass. Gen. Laws Ann. 55A § 1A(a)(2) (1996).

[45] Mass. Gen. Laws Ann. 55A § 1A(b) (1996).

statement will result in that candidate's name not appearing on the ballot.[46]

Other states impose different expenditure limits depending on the office sought. The laws in Minnesota and Vermont, for example, mandate different expenditure limits for different elected offices, as well as different limits for the same office depending on the particular candidate seeking that office.[47] Minnesota's expenditure ceiling law is somewhat more complex, and arguably more restrictive, than Missouri's law. In Missouri, all candidates for the same office are subject to the same expenditure limits, if they pledge to abide by those limits.[48] In Minnesota, the expenditure limits are higher for those candidates who have never before run for office.[49] If a candidate agrees to the limits and thereby becomes eligible for a public subsidy, but then exceeds those limits, that candidate may be fined in an amount up to four times the amount by which the expenditures limit was exceeded.[50] However, if that candidate's opponent does not agree to limit his or her expenditures, then the subscribing candidate is no longer bound by the limits, is still eligible for a public subsidy, and also receives his or her opponent's share of the public

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[46] Mass. Gen. Laws Ann. 55A § 1A(b) (1996).

[47] Vt. Stat. Ann. 17 § 2841 (1994); Minn. Stat. Ann. § 10A.25 (1996).

[48] § 130.052.1, Rev. Stat. Mo. (Supp. 1995).

[49] Minn. Stat. Ann. § 10A.25, Subd. 2(c) (West 1996).

[50] Minn. Stat. Ann. § 10A.25, Subd. 1 (West 1996).

subsidy.[51] These consequences could be considered "burdens" to candidates who do not subscribe to the limits, and Minnesota is bound by the decisions of the Eighth Circuit Court of Appeals. The court of appeals decision appears to undercut Minnesota's law.

Laws are also in jeopardy in Vermont and Texas. Vermont subjects incumbents and challengers to different expenditure limits.[52] A challenger candidate who agrees to the limits may spend up to 110 percent of the amount spent by the incumbent.[53] A candidate's agreement to abide by the limits does not lead to any public funding. Rather, that initial decision merely gives rise to a series of consequences, both beneficial and nonbeneficial. If a candidate agrees to the limits, then his or her name appears on a list prepared by the Secretary of State of subscribing candidates.[54] If the candidate then exceeds those limits, he or she is subject to both civil and criminal penalties.[55] But under the court of appeal's holding, Vermont's statute may be in jeopardy because it does not contain the sole appropriate "benefit" or "incentive," namely, public funding.

Texas' law is also in jeopardy. In Texas, all candidates for judicial office must file a statement indicating whether they will abide by the state's expenditure

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[51] Minn. Stat. Ann. § 10A.25, Subd. 10(b) (West 1996).

[52] Vt. Stat. Ann. 17 § 2842(c) (1994).

[53] Vt. Stat. Ann. 17 § 2842(c) (1994).

[54] Vt. Stat. Ann. 17 § 2841(c) (1994).

[55] Vt. Stat. Ann. 17 § 2806(b) (1994).

limits.[56] Until a candidate files this statement, however, he or she may not accept contributions or make any campaign expenditures.[57] Like Vermont's law and Missouri's law, that initial declaration is wholly voluntary and does not trigger public funding.[58]

Unfortunately, the court of appeals' opinion may encourage Texas, Vermont and other states to repeal their current voluntary expenditure ceilings, or prevent them from enacting new limits. Indeed, several states' legislatures have already repealed expenditure ceiling laws.[59] Many did so undoubtedly as a result of this Court's decision in *Buckley*, incorrectly believing, as did the Eight Circuit, that this Court in *Buckley* determined the validity of all campaign expenditure ceilings. This is evidenced by the legislative history behind Alaska's repealed limits. The historical notes to Alaska's annotated statutes indicate that

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[56] Tex. Elec. Code Ann. § 253.164(a) (Vernon 1996).

[57] Tex. Elec. Code Ann. § 253.164(c) (Vernon 1996).

[58] Tex. Elec. Code Ann. § 253.164 (Vernon 1996).

[59] *Eg.*, Alaska Stat. §§ 15.13.070(f) and (g), repealed by SLA 1986, ch. 85, § 45; Del. Code Ann. 15 §§ 8007-8009, repealed by 67 Del. Laws, ch. 449, § 1, effective Jan. 1, 1991; R.I. Gen. Laws § 17-25-6, repealed by PL 1981, ch. 188, § 3; and S.D. Cod. Laws § 12-25-7, repealed by SL 1976, ch. 109, § 8.

Alaska's expenditure limits were not enforced because they were believed to violate the *Buckley* holding.[60]

The chilling effect of this Court's discussion of expenditure ceilings in *Buckley* is easily explained. This Court had before it only two extreme forms of expenditure ceiling: an absolute limit, which it rejected; and a voluntary limit tied to expensive public financing, which it sustained. The Court could only have dealt in dicta with variations of more moderate cost and effect; it appropriately chose not to speculate as to the constitutionality of incentives other than public funds. Until now, legislatures may have felt constrained, but they were not precluded from trying alternatives. The Eighth Circuit's decision does not chill legislative action; it freezes it.

Unless this Court now acts to consider whether there is some constitutionally permissible middle ground, all efforts by common citizens to reform campaign funding laws will be doomed in the absence of significant taxpayer obligations. This Court should tell the states, Congress, and those citizens agitating for reform whether the Eight Circuit correctly read *Buckley* to preclude the innovation of non-financial incentives to abide by voluntary expenditure ceilings, or whether there is still reason to believe that something -- anything -- other than a public funding incentive is constitutionally permissible.

II. In rejecting Missouri's carryover provision, the Eighth Circuit has found a right of candidates to determine unilaterally what they may do with contributors' funds, has elevated that right over the interest of the state and the people in full and

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[60] *See* Historical Notes to Alaska Stat. § 15.13.070.

robust political debate, and has both threatened existing campaign laws and inhibited future campaign finance reforms -- all without any guidance from this Court.

This Court has recognized that a principal purpose of the First Amendment is to promote an "uninhibited, robust, and wide-open" debate on public issues.[61] To that end, the overwhelming majority of the states have enacted laws limiting the use of campaign contributions for purposes other than such debate, by placing time and spending restrictions on candidates' use of campaign funds. Missouri has added just one restriction to that set of laws: a requirement that candidates use, rather than carry over to some possible future campaign, the money that contributors give them to speak.

The court of appeals, like the United States District Court for the Eastern District of California in its review of a similar California provision,[62] held that such limitations are unconstitutional, purportedly under the holding of *Buckley v. Valeo*.[63] Neither court was able to point to anything on point in *Buckley*, for this Court has never held that candidates have a right to take contributors' funds and then refuse to use them to speak. Both courts ignored the fact that these limitations are far more similar in their workings and effect on speech to

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[61] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

[62] *See Service Employees International Union v. Fair Political Practices Commission*, 721 F. Supp. 1172 (E.D. Cal. 1989).

[63] *See ibid.* at 1175-1179.

the type of contribution limits that this Court has upheld[64] than they are to the type of unconstitutional spending limits that the Court struck down in *Buckley*. Both courts' decisions are inconsistent with this Court's earlier denial of certiorari to review a similar Florida statute.[65] And although the decision of one district court has not had a significant impact on the progress of campaign finance reform, the decision of the Eighth Circuit will.

The Eighth Circuit decision in this case is particularly troublesome if its decision in *Carver v. Nixon* is allowed to stand. In *Carver*, the Eighth Circuit abandoned this Court's references to contributions constituting "speech by proxy"[66] and its declaration in *Buckley* that contribution limits have little effect on contributors' free speech rights because it is the act of contributing, not the amount of the contribution, that constitutes speech.[67] Instead, the Eighth Circuit declared that a contributor is speaking indirectly during the campaign, *i.e.*, that the candidate's speech is, in essence, the speech of the contributor for First Amendment purposes. Then, the Eighth Circuit in this case abandoned the idea that

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[64] *See, e.g., Buckley*, 424 U.S. at 29.

[65] *See Ferre v. Florida*, 481 U.S. 1037 (1987) (declining to review decision of Florida court decisions, upholding constitutionality of a statute that prohibits candidates from accepting contributions after a certain period of time following an election, in *Ferre v. State*, 494 So.2d 214 (Fla. 1986), and *Ferre v. State*, 478 So.2d 1077 (Fla. Dist. Ct. App. 1985)).

[66] *California Medical Association v. Federal Election Commission*, 453 U.S. 182, 195-97 (1981).

[67] 424 U.S. at 20-21.

contributors are speaking and took the inconsistent position that candidates have an unfettered right to accept the contributors' money, but then *not* to use it to speak. In fact, the Eighth Circuit has held that a candidate has a constitutional right to take money from contributors who support her in one race against one opponent, then to use that money in another race against another candidate -- regardless of which candidate the contributor may support in that other race! That holding is necessarily premised on the conclusion that once the candidate receives the money, it is no longer a symbol of speech. It is necessarily premised on the conclusion that once funds are contributed, they become the sole property of the candidate, to use as she wishes.

The latter conclusion affects laws in 34 of the 50 states and the District of Columbia.[68] Those jurisdictions

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[68] For examples of laws restricting the use, or timing of use, of campaign contributions by candidates, other than Missouri's, *see*: Ala. Code §§ 36-25-6 (b)-(d) and 17-22A-7(a) (1995); Ariz. Rev. Stat. Ann. §§ 16-905G and 16-915.01 (1995); Ark. Stat. Ann. § 7-6-203(I)(2) and (j)(1)-(3) (1995); Cal. Elec. Code § 20300 (West 1996); Colo. Rev. Stat. § 1-45-117 (1995); Conn. Gen. Stat. Ann. §§ 9-333i(g), 9-333j(e) and 9-333r (1995); Del. Code Ann. 15 §§ 8020 and 8022 (1995); D.C. Code Ann. § 1-1472 (1995); Fla. Stat. Ann. § 106.141 (West 1995); Ga. Code Ann. § 21-5-33 (Harrison 1995); Haw. Rev. Stat. §§ 11-200 and 11-206 (1995); Ill. Ann. Stat. ch. 10, para. 5/9-5 (Smith-Hurd 1995); Ind. Code Ann. §§ 3-9-1-12, 3-9-2-9 and 3-9-3-4 (West 1996); Iowa Code Ann. §§ 56.41 and 56.42 (West 1995); Kan. Stat. Ann. § 25-4157a (1994); Ky. Rev. Stat. Ann. § 121.180(10) (Baldwin 1996); La. Rev. Stat. Ann. § 1505.2.I. (West 1996); Me. Rev. Stat. Ann. 21-A § 1017.8 (1995); Md. Elec. Code Ann. § 26-7(d) (1995); Mich. Comp. Laws Ann. § 169.245 (West 1996);

contemplate that contributors' dollars are to be placed in a kind of trust status -- a status that is entirely inconsistent with, and thus threatened by, the Eighth Circuit's decision.

A few years ago, the respondents might have cried out that the restrictions imposed in other states bore no relationship to Missouri's determination that contributed funds must either be used or returned to the contributors. But that is no longer true. Since the United States District Court for the Eastern District of California reached its decision in 1989, at least 18 states have enacted laws that, like California's carryover provisions, directly affect the ability of candidates to use contributions accepted in one campaign to fight the battle of another.[69] Missouri's law is just one example. It requires candidates to dispose of any unspent campaign funds, less outstanding amounts owed for campaign expenses incurred prior to election day, within a certain

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Minn. Stat. Ann. § 10A.25, Subd. 11 (West 1996); Nev. Rev. Stat. § 294A.160 (1993); N.J. Rev. Stat. Ann. § 19:44A-11.2 (West 1996); N.M. Stat. Ann. § 1-19-29.1 (1995); Ohio Rev. Code Ann. §§ 3517.109 and 3517.13 (Baldwin 1995); Okla. Stat. Ann. 51 § 316 (West 1996); R.I. Gen. Laws § 17-25-7.2 (1994); S.C. Code Ann. §§ 8-13-1370, 8-13-1340, 8-13-1352 and 8-13-1350 (Law Co-op. 1993); Tenn. Code Ann. § 2-10-114 (1995); Tex. Elec. Code Ann. § 254.204 (Vernon 1996); Va. Code Ann. § 24.2-921 (1994); Wash. Rev. Code Ann. § 42.17.095 (1996); Wis. Stat. Ann. §§ 11.16(4), 11.19(1) and 11.25(2) (West 1995).

[69] § 130.130, Rev. Stat. Mo. (Supp. 1995). The other states are Arkansas, California, Colorado, Connecticut, Iowa, Kansas, Kentucky, Maine, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee and Virginia. *See* footnote 68, supra.

period of time after the election is concluded; nine other states have similar requirements.[70] In Missouri, candidates may dispose of such excess funds by returning them to contributors or donating them to the state. Approximately 28 other states with carryover provisions permit candidates to return funds to contributors,[71] and approximately 18 of those states permit donation of the excess funds to the state.[72]

Missouri's carryover provision does not provide some of the options for disposal of excess funds that other states provide. For example, some states permit successful candidates to use left-over contributed funds to pay for inaugural festivities, or to defray transition or other expenses associated with the office for which they have successfully run.[73] Still other states permit candidates to make donations

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[70] These states are Arkansas, Connecticut, the District of Columbia, Florida, Maine, Ohio, Oklahoma, Tennessee and Texas. *See* footnote 68, supra.

[71] Not all of these states require return within a certain time limit. The states permitting return are Arizona, Arkansas, California, Connecticut, the District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington and Wisconsin. *See* footnote 68, supra.

[72] Again, not all such states establish a time frame: Alabama, Arkansas, Florida, Georgia, Indiana, Iowa, Kentucky, Maine, Maryland, Minnesota, New Mexico, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Washington and Wisconsin. *See* footnote 68, supra.

[73] Examples are Alabama, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii,

to charities and other not-for-profit organizations.[74] Because it lacks such provisions, and thus is more closely tied to contributors' interests and the question of contributors' speech, Missouri's carryover provision is an ideal statute for review by this Court. Although it is marked by features common to many of the states' laws, it is simple and straightforward enough to permit this Court to provide the guidance that the states need as they struggle to preserve the integrity of the election process. . .

By granting the writ and hearing this case, this Court will be able to provide needed guidance concerning the constitutionality of statutes, found in the overwhelming majority of the states[75] that prohibit candidates from

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Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington and Wisconsin. *See* footnote 68, *supra*.

[74] This is the case in the following states: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Washington and Wisconsin. *See* footnote 68, *supra*.

[75] While some states only explicitly address the use of excess contributions after an election, others contain an explicit ban on personal use of contributions at any time during the elections process. *See* Ala. Code §§ 36-25-6(d) and 17-22A-7(a) (1995); Ariz. Stat. Ann. § 7-6-203(I)(2) and (j)(3) (1995); Cal. Elec. Code § 89512.5 (West 1996); Colo. Rev. Stat. § 1-45-117(1) (1995); Conn. Gen. Stat. Ann. § 9-333i(g)(4) (1995); Del. Code Ann. 15 § 8020

converting contributors' funds to personal use at any time, either prior to or after the election. The universal acceptance of such provisions has never been sanctioned by this Court -- nor could it easily be sanctioned, were this Court to affirm that candidates have the kind of unfettered rights to that money that the Eight Circuit has found is constitutionally mandated. At minimum, the Eighth Circuit decision calls into question the constitutionality of myriad state statutes that restrict a candidate's ability to use campaign funds for future campaigns[76] or to transfer such

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(1995); Fla. Stat. Ann. § 106.141(5) (West 1995); Ga. Code Ann. § 21-5-33(a) and (c)(Harrison 1995); Haw. Rev. Stat. § 11-206 (1995); Ill. Ann. Stat. ch. 10, para. 5/9-5 (Smith-Hurd 1995); Ind. Code Ann. § 3-9-2-9 (West 1996); Iowa Code Ann. § 56.41.1 (West 1995); Kan. Stat. Ann. § 25-4157a(a) (1994); La. Rev. Stat. Ann. § 1505.2.I. (West 1996); Nev. Rev. Stat. § 294A.160 (1993); N.H. Rev. Stat. Ann. § 664:4-b (1994); N.J. Rev. Stat. Ann. § 19:44A-11.2 (West 1996); N.M. Stat. Ann. § 1-19-29.1 (1995); N.Y. Elec. Law § 14-130 (McKinney 1996); Ohio Rev. Code Ann. § 3517.13(O) (Baldwin 1995); Okla. Stat. Ann. 15 § 316 (West 1996); R.I. Gen. Laws § 17-25-7.2 (1994); S.C. Code Ann. § 8-13-1370 (Law. Co-op. 1993); Tenn. Code Ann. § 2-10-114(b) (1995); Tex. Elec. Code Ann. §§ 253.038 and 253.035 (Vernon 1996); Vt. Stat. Ann. 17 § 2804 (1994); Va. Code Ann. § 24.2-921 (1994); Wash. Rev. Code Ann. § 42.17.125 (1996); Wis. Stat. Ann. § 11.25(2) (West 1995).

[76] At least 14 statutes prohibit such use, including Ark. Stat. Ann. § 7-6-203(j)(1) (1995); Conn. Gen. Stat. Ann. § 9-333j(e)(1)(A) (1995); Del. Code Ann. 15 § 8020 (1995); D.C. Code Ann. § 1-1472 (1995); Fla. Stat. Ann. § 106.141 (West 1995); Haw. Rev. Stat. § 11-200 (1995); Kan. Stat. Ann. § 25-4157a (1994); Ky.

funds to other candidates[77] or political groups.[78] The Eighth Circuit decision thus invites litigation in all fifty states. The answers to the questions posed in those cases are not given in any of this Court's prior precedents. Review of this case would provide some general guidance concerning the extent of a candidate's right to use funds contributed by others that would give the states and their citizens some guideposts to follow.

Rev. Stat. Ann. § 121.180(10) (Baldwin 1996); Me. Rev. Stat. Ann. 21-A § 1017.8 (1995); Md. Elec. Code Ann. § 26-7(d) (1995); N.M. Stat. Ann. § 1-19-29.1 (1995); Ohio Rev. Code Ann. § 3517.109(B) (Baldwin 1995); S.C. Code Ann. §§ 8-13-1370, 8-13-1352 and 8-13-1350 (Law. Co-op 1993); Wash. Rev. Code Ann. § 42.17.095 (1996).

[77] Statutes containing this type of limitation include Cal. Elec. Code § 85304 (West 1996); Conn. Gen. Stat. Ann. § 9-333r(a) (1995); D.C. Code Ann. § 1-1472 (1995); Haw. Rev. Stat. § 11-200 (1995); Ill. Ann. Stat. ch. 10, para. 5/9-5 (Smith-Hurd 1995); Iowa Code Ann. § 56.42 (West 1995); Kan. Stat. Ann. § 25-4157a (1994); Ky. Rev. Stat. Ann. § 121.180(10) (Baldwin 1996); Md. Elec. Code Ann. § 26-7(d) (1995); Mich. Comp. Laws Ann. § 169.245 (West 1996); Minn. Stat. Ann. § 10A.25 Subd. 11 (West 1996); N.M. Stat. Ann. § 1-19-29.1 (1995); S.C. Code Ann. § 8-13-1340 (Law Co-op. 1993); Wash. Rev. Code Ann. § 42.17.095 (1996).

[78] *See. e.g.* Cal. Elec. Code §§ 89510, 89512.5, 85304 (West 1996); Conn. Gen. Stat. Ann. § 9-333r(a) (1995); Ill. Ann. Stat. ch. 10, para. 5/9-5 (Smith-Hurd 1995); N.M. Stat. Ann. § 1-19-29.1 (1995); Wash. Code Ann. § 42.17.095 (1996).

III. The court of appeals' evidentiary requirement will have broad adverse implications for states attempting to address any compelling state interest, whether or not related to elections or campaign finance reform, because it cannot be met where there are no formal legislative histories or where a law is enacted by initiative.

In rendering its decision in this case, as in *Carver v. Nixon*, the court of appeals established a new standard of review for certain types of statutes challenged on First Amendment grounds. The court repeated throughout its opinion that it "disagreed" with the State of Missouri's conclusions that the campaign finance measures at issue in the case were narrowly tailored to address compelling state interests and that the "state ha[d] failed to meet its burden."[79] At no point in the decision did the court discuss the voluminous evidence submitted by the State of Missouri to demonstrate that the provisions are narrowly tailored to address several compelling state interests, including the prevention of the appearance of corruption. More important for the future, at no point did Eighth Circuit indicate what kind of evidence -- if any -- could meet the undefined standard it imposed.

By drawing its own conclusions irrespective of the evidence introduced by the State of Missouri, the court of appeals has established a precedent which will make it difficult, if not impossible, for states that do not record legislative history or that do permit their voters to enact laws through the initiative process to defend the constitutionality of their campaign reform laws. Without saying so explicitly, the court of appeals affirmed and

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[79] *See* App. at A-9 and similar statements at A-10, A-14, A-15 and A-16.

endorsed the district court's view that "[a]lthough defendants have argued a number of potential justifications for the laws at issue here, they have not provided any evidence that either the state legislature or the electorate actually considered those justifications in enacting Senate Bill 650 or Proposition A."[80]

The courts below ignored an essential fact of legislative enactments in the states: the absence of the kind the extensive legislative findings and history that often characterize Congressional acts. For example, Missouri's General Assembly, like the legislative bodies in most states, does not keep any type of formal legislative proceedings other than journals recording the transfer of bills and other matters from one chamber to another, transfers of bills to and from committees, and the progress of deliberations and amendments on the floor of each chamber. This journal does not contain minutes of statements in support of or in opposition to bills. Legislators are not required to incorporate a clause into each bill outlining the purpose for enacting the bill or the legislative findings leading to the bill's enactment, and the legislators do not ordinarily include such clauses. Committee meetings and hearings and not generally recorded. Thus, in most cases in Missouri and other states with similar practices, providing a court with evidence of the legislative history supporting

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[80] App. at A-22. The district court recognized that it might be impossible for the State of Missouri to adduce legislative history or "findings" in this case, and claimed to give the state "the benefit of the doubt" concerning the reasons for the passage of the laws. App. at A-22. No such benefit of the doubt appears to have been given when reviewing the state's evidence that the laws are narrowly tailored to serve the admittedly compelling state interests, however.

a particular law is a matter of piecing together any written materials which legislative staff members may have retained following the law's enactment, gathering statements from any knowledgeable witnesses to committee deliberations and looking at the facts which were known and obvious to the legislators at the time the law was under consideration.

While providing evidence to support an act of the state legislature may be difficult, proving the "initiative history" for measures adopted through the initiative process is virtually impossible. Before a statewide initiative measure may be placed on the ballot, petitions containing the text of the proposed statute must be signed by a certain number of registered voters.[81] Aside from the text of the proposed measure, the petitions contain a ballot title of no more than 100 words that is drafted by the Secretary of State and summarizes the measure's provisions in a neutral fashion.[82] The text of the proposed measure does not have to, and does not usually, identify the purpose of the measure. Thus, nothing in the formal initiative process creates a record of the findings or goals of either the proponents or circulators of the measure, or of the citizens who vote for its passage. In fact, it is inappropriate to include extraneous material, such as graphs, charts, and other presentations of data -- the very material that presumably the Eighth Circuit would require, were it to actually specify what evidentiary burden it was imposing.[83]

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[81] Article III, § 50, *Constitution of the State of Missouri* (1945).

[82] § 116.334.1, Rev. Stat. Mo. (1994).

[83] *See Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 22-23 (Mo. 1981) (Rendlen, J., dissenting).

Missouri courts have reflected this Court's scepticism about legislative history and committee "findings."[84] It would be truly ironic to permit the courts of appeals to now condemn statutes in Missouri and elsewhere for not including in legislative history, committee reports, and bills or initiative petitions some sort of self-serving "findings" to support the action they contemplate. This Court in *Buckley* relied not on express, specific Congressional findings. Instead it relied largely on the plain language of the Constitution and the statutes, on common knowledge, on logic, and on policies leading to honest government. The Eighth Circuit's attempt to lead the courts away from the example set in *Buckley* and toward some unidentified and unworkable evidentiary goal demands the attention of this Court.

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[84] *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989); *Gershman Investment Corp. v. Duckett Creek Sewer District*, 851 S.W.2d 765, 768-769 (Mo. Ct. App. 1993); *Hastings v. Van Black*, 831 S.W.2d 214, 215-215 (Mo. Ct. App. 1992); *Risk Control Associates, Inc. v. Melahn*, 822 S.W.2d 531, 535 (Mo. Ct. App. 1991), *reh'g. transfer denied*.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 95-2857

Shrink Missouri Government PAC, a political action committee; W. Bevis Shock; Frederick T. Dyer,	*	
Appellees,	*	
	*	Appeal from the United States District
	*	District Court for the
v.	*	Eastern District of
	*	Missouri.
John Maupin, in his official capacity as Chair of the Missouri Ethics Commission; Jeremiah W. Nixon, is his official capacity as Missouri Attorney General,	*	
Appellants.	*	

Submitted: September 13, 1995

Filed: December 19, 1995

Before BOWMAN, ROSS, and JOHN R. GIBSON, Circuit Judges.

BOWMAN, Circuit Judge.

Missouri's Campaign Finance Disclosure Law, Mo. Rev. Stat. Ch. 130 (1994), was amended twice in 1994. In July the state legislature adopted a measure commonly known as Senate Bill 650, and in November the citizens of Missouri adopted a ballot initiative commonly known as Proposition A. Both of these measures limit election campaign contributions and expenditures and thus tend to limit the free exercise of political speech that the First Amendment guarantees. W. Bevis Shock and Frederick T. Dyer, prospective candidates for public office, and Shrink Missouri Government PAC, a political action committee (PAC) planning to make campaign contributions in future elections, sought a permanent injunction against the implementation and enforcement of the following provisions of the amended Campaign Finance Disclosure Law: (1) the Proposition A limits on campaign contributions, Mo. Ann. Stat. § 130.100 (Vernon Supp. 1995), as applied to contributions by candidates to their own campaigns; (2) the limits on total expenditures by candidates, id. §§ 130.052, 130.053; (3) the restrictions on carrying over campaign funds from one election to another, id. § 130.130; and (4) the requirement that negative campaign advertisements state that they were approved and authorized by the candidate on whose behalf they were disseminated, id. § 130.031. On cross-motions for summary judgment, the District Court[1] held that each of these provisions violated the First Amendment rights of candidates and their contributors. The

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[1]The Honorable Catherine D. Perry, United States District Judge for the Eastern District of Missouri.

court enjoined the Attorney General of Missouri and the Chair of the Missouri Ethics Commission (referred to herein jointly as "the state") from implementing, enforcing, or acting in reliance on the challenged provisions. Shrink Missouri Government PAC v. Maupin, 892 F. Supp. 1246 (E.D. Mo. 1995). The state now timely appeals.[2] After a de novo review of the District Court's judgment, see Maitland v. University of Minnesota, 43 F.3d 357, 360 (8th Cir. 1994), we conclude that the challenged provisions violate the First Amendment. We therefore affirm the well-reasoned decision of the District Court.

I.

As a preliminary matter, we must address the state's contention that summary judgment should not have been granted because genuine issues of material fact remain in dispute. See Fed. R. Civ. P. 56(c). The state did not make this contention in the District Court. Moreover, as the state notes, both sides agreed that the case could be decided on the cross motions for summary judgment. The state thus has waived this issue. See Empire State Bank v. Citizens State Bank, 932 F.2d 1250, 1253 (8th Cir. 1991). In any event, we are satisfied that no genuine issues of material fact remain in dispute.

II.

The State argues that the District Court erred when it (1) addressed the constitutionality of applying the Proposition A contribution limits to the candidates

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[2]The state does not appeal the District Court's decision that the "approved and authorized" requirement of Mo. Ann. Stat. § 130.031 is unconstitutional, so that issue is not before us.

themselves because no Article III case or controversy existed between the parties with respect to that issue; (2) held that the state's "voluntary" expenditure limits scheme is unconstitutional; and (3) held that the restrictions on carrying over campaign funds from one election to another is unconstitutional. We will address each of these arguments in turn.

A.

The District Court held that the Proposition A campaign contribution limits are unconstitutional to the extent that they limit a candidates's ability to use his or her personal funds or property in support of the candidate's own campaign for public office. See Mo. Ann. Stat. § 130.100 (Vernon Supp. 1995) (limiting "contributions"); Mo. Rev. Stat. § 130.011(12)(a) (1994) (defining "contributions" to include a "candidate's own money"). The state argues that the District Court was without jurisdiction to consider this question, there being no Article III case or controversy because state officials have not threatened to prosecute candidates for making over-the-limit contributions to their own campaigns. We need not consider the jurisdictional point, however, because in a companion case this Court has held that the Proposition A contribution limits are unconstitutional on their face. Carver v. Nixon, No. 95-2608, slip op. at 25 (8th Cir. Dec. 19, 1995). Thus those limits necessarily are unconstitutional as applied to candidates as well as to other contributors.

B.

The District Court held that Senate Bill 650's "program of voluntary expenditure ceilings," State's Brief at 13, is coercive, restricts protected speech, and fails to pass constitutional muster under the strict scrutiny test.

Shrink Missouri Gov't PAC, 892 F. Supp. at 1252. The state argues that these voluntary spending limits are constitutional under Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), in which, inter alia, the Supreme Court struck down spending limits imposed by the Federal Election Campaign Act of 1971 as amended in 1974, 2 U.S.C. § 441a (1976).

The statute at issue in this case requires candidates for elected public office in Missouri to file an affidavit stating whether they will comply with spending limits that vary depending on the office sought. Mo. Ann. Stat. § 130.052.1 (Vernon Supp. 1995). The affidavit must be filed with the candidate's declaration of candidacy. Candidates who choose not to comply with the spending limits may accept contributions from individuals only and must refuse contributions from PACs, political parties, labor unions, corporations, etc. Id. § 130.052.3. Non-complying candidates also must submit daily disclosure reports once they exceed the spending limits. See id. § 130.052.3. No such restrictions or requirements are placed on candidates who swear to abide by the limits, though they are penalized if they spend more than the applicable limit, see id. § 130.053.1.

When considering whether a campaign finance law unconstitutionally infringes freedom of speech, this Court's task is to decide whether the provision in question actually "burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest." Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657 (1990) (citing Buckley, 424 U.S. 1); see also Day v. Holahan, 34 F.3d 1356, 1361 (8th Cir. 1994), cert. denied, 115 S. Ct. 936 (1995).

Relying on a footnote in Buckley, the state argues that the expenditure limits are clearly constitutional regardless of the level of scrutiny applied because they are voluntary and merely provide an incentive for compliance. In Buckley, the Supreme Court held that limitations on the total expenditures by a candidate for federal office violated the First Amendment. 424 U.S. at 54-58. The Court nonetheless noted that

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.

Id. at 57 n.65. The spending limits adopted by the Missouri legislature differ substantially from the scenario described in footnote 65 of Buckley and are thus distinguishable.[3]

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[3]Because the Missouri expenditure limits are distinguishable from the scenario described in the Buckley footnote, we need not and do not address the difficult question of the extent of the state's power to condition the receipt of benefits on the renunciation of constitutionally protected rights. See Rust v. Sullivan, 500 U.S. 173, 197 (1991) (distinguishing constitutional conditions placed on uses of government funds by benefit recipients and unconstitutional conditions placed on recipients themselves); compare Rodney A. Smolla, The Reemergence of the Right-Privilege Distinction in Constitutional Law, 35 Stan. L. Rev. 69 (1982), with William H. Van Alstyne, The Demise of the Right-

The Senate Bill 650 limits are not voluntary because they provide only penalties for noncompliance rather than an incentive for voluntary compliance. Therefore the state's reliance on the dicta in footnote 65 of Buckley is misplaced.

In the hypothetical set out in footnote 65, a candidate agreeing to limit his or her expenditures receives the benefit of public funding. Candidates who do not so agree do not receive public funding, but are not penalized for their reliance on private funding. Under Senate Bill 650, however, a candidate agreeing to abide by the spending limits receives no benefit other than the state's blessing to seek the private funding he or she would be free to seek in any event. At the same time, candidates who do not agree to abide by the spending limits are penalized in two ways: (1) the state makes it unlawful to seek important sources of private funding that otherwise they would be free to seek; and (2) the state requires daily reporting of expenditures. These penalties make the limits coercive, not voluntary. The state, however, does not believe that it is withdrawing an otherwise available source of funding; it characterizes the availability of organizational funding as the incentive that it offers to candidates to agree to abide by the spending limits. We disagree with the state's characterization.

From the state's perspective, it is providing complying candidates with a substantial benefit by "allowing" PACs, political parties, labor unions, corporations, and other organizations to make campaign contributions. The state's argument, however, assumes that it properly could ban such organizations from making any

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Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

contributions to candidates running for state office. This assumption is incorrect. We believe it is clear that a ban on campaign contributions by organizations would not survive a constitutional challenge. See, e.g., Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 263 (1986) (striking down federal limitation on use of corporate funds in connection with federal elections as applied to nonprofit corporation); Day v. Holahan, 34 F.3d at 1365-66 (invalidating Minnesota's $100 limit on contributions from individuals and PACs). We note that the Supreme Court has indicated that expenditure limits applied to organizations "impinge on protected associational freedoms" as well as freedom of speech. Buckley, 424 U.S. at 22. Thus the state's argument that it offers an incentive by allowing candidates to accept such contributions is disingenuous. Organizational contributions are constitutionally protected irrespective of any agreement by a candidate to abide by the state-imposed expenditure limits. No candidate would voluntarily agree to comply with the expenditure limits in exchange for access to sources of funding to which he or she already has a constitutional right of access. Rather, Senate Bill 650 forces compliance by imposing substantial penalties for non-compliance. The purported benefit is illusory, and the statute is coercive.

We therefore conclude that Senate Bill 650 "impose[s] direct and substantial restraints on the quantity of political speech," speech that is "at the core of . . . the First Amendment freedoms." Buckley, 424 U.S. at 39 (internal quotation marks and citation omitted); see also Day v. Holahan, 34 F.3d at 1360 (holding that limits on independent expenditures infringe protected speech). Even though the statute infringes protected speech, the statute nonetheless will be upheld "if the state can show that it is narrowly drawn to serve a compelling state interest." Day

v. Holahan, 34 F.3d at 1361; see also Austin, 494 U.S. at 657. In this case the state has failed to meet its burden.

First the state argues that the "over-arching state interest" served by Senate Bill 650 is the reduction of corruption and the appearance of corruption in the state's election process. State's Brief at 15. The state also refers to its related concerns with "the integrity of the [electoral] process," id. at 20, and public "confidence in the system of representative government," id. at 30 (quotation marks and citation omitted). While the state's interest in reducing corruption and its related concerns constitute a compelling state interest, the state has failed to explain how the campaign spending limits here in question are narrowly tailored to serve this interest or address these concerns. Indeed, we are hard-pressed to discern how the interests of good government could possibly be served by campaign expenditure laws that necessarily have the effect of limiting the quantity of political speech in which candidates for public office are allowed to engage. See Buckley, 424 U.S. at 55-57.

The state also argues that the expenditure limits are justified by its interests in (1) maintaining the individual citizen's participation in and responsibility for the conduct of government and (2) discouraging "the race toward hugely expensive campaigns, especially at the local level," State's Brief at 17-18. The state's interest in maintaining individual participation is what the District Court correctly described as an effort to "'level[] the playing field' between the rich and the poor." Shrink Missouri Gov't PAC, 892 F. Supp. at 1253. The Supreme Court in Buckley, however, specifically held that the government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others," Buckley, 424 U.S. at 48-49, and no subsequent decision of the Court has undermined

that holding.[4] With respect to the state's interest in keeping down the costs of running for office, we note that the Buckley Court held that "the mere growth in the cost of . . . election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending." Buckley, 424 U.S. at 57. This Court is not at liberty to disregard the explicit holdings of Buckley. We therefore hold that the state, having failed to show that the expenditure limits here at issue are narrowly drawn to serve a compelling state interest, has not justified the substantial burden that these limits place on speech that is at the core of the First Amendment.

Our analysis is not complete, however, because the state argues that the District Court should not have enjoined enforcement and implementation of sections 130.052 and 130.053 in their entirety. The state contends that several provisions can be implemented constitutionally despite the invalidity of the expenditure limits. These provisions include the requirement that candidates declare whether they will keep their expenditures within the unconstitutional limits, the unconstitutional limits themselves (described by the state for purposes of its severability argument as "the

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[4]Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), is not to the contrary. While the Supreme Court upheld Michigan's restriction on independent expenditures by corporations in support of or in opposition to candidates for state office, the Court did not overrule Buckley and "hinted" that its decision was limited by the fact that the restriction applied only to independent expenditures by corporate entities and did not apply to such expenditures by individuals. See Lillian R. BeVier, Campaign Finance Reform: Specious Arguments, Intractable Dilemmas, 94 Colum. L. Rev. 1258, 1270 (1994).

legislature's views as to the appropriate ceilings on expenditures," State's Brief at 30), and the disclosure requirements that are triggered by exceeding the unconstitutional limits. The state argues that these provisions should have been severed from the invalid parts of the statute. See Mo. Rev. Stat. § 1.140 (1994) (providing for general severability of all Missouri statutes).

The District Court did not address the severability of any remaining portions of Senate Bill 650 under Missouri law, see Kinley Corp. v. Iowa Utilities Board, 999 F.2d 354, 359 (8th Cir. 1993) (holding that questions regarding severability of state statutes are controlled by state law), but we think the proper response to the state's argument is clear: the remaining portions of sections 130.052 and 130.053 are not severable.

Once the unconstitutional portions of a statute are excised, the remainder can be upheld under Missouri law if it "is in all respects complete and susceptible of constitutional enforcement" and the court concludes that it would have been adopted even if it had been known that "the excluded portion was invalid." Millsap v. Quinn, 785 S.W.2d 82, 85 (Mo. 1990) (en banc). In Ryan v. Kirkpatrick, the Missouri Supreme Court left intact the remainder of the Campaign Finance Disclosure Law after invalidating one discrete provision. 669 S.W.2d 215, 219-20 (Mo. 1984) (en banc). That court held that the unconstitutional portions "are not so intertwined with [the law's] valid provisions as to leave it too enervated to stand." Id. In this case, the District Court did not invalidate all of Senate Bill 650; here the state asks us to leave intact portions of the very same discrete provisions that impose unconstitutional restraints on First Amendment rights. We cannot oblige the state. Every subsection of sections 130.052 and 130.053 makes some reference to the

expenditure limits that we have held unconstitutional. The invalid portions are inextricably intertwined with the remainder of the statute. Moreover, the statute provides that "[c]ampaign expenditures shall be limited pursuant to this section" and that "[t]o be in compliance with the expenditure limits . . ., the following expenditure limits . . . may not be exceeded by a candidate committee." Mo. Ann. Stat. § 130.052 (Vernon Supp. 1995) (emphasis added). The state proposes that we convert this mandatory language into a non-binding legislative recommendation. The legislature, however, did not enact a set of suggestions.

In sum, any remaining valid provisions of sections 130.052 and 130.053 are not complete and susceptible of constitutional enforcement and we cannot conclude that the legislature would have adopted them had it known the expenditure limits were unconstitutional. The District Court thus did not err when it enjoined the enforcement and implementation of sections 130.052 and 130.053 in their entirety.

C.

In Proposition A the citizens of Missouri adopted a measure designed to address the practice of carrying over "war chests" of campaign funds for future elections.[5] Under the ballot initiative measure, within ninety days of an election a candidate must turn over any excess funds, "except for an amount no greater than ten times the individual contribution limit" for the office sought, to the

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[5]The legislature, in Senate Bill 650, earlier adopted a similar, but less restrictive, measure. See Mo. Ann. Stat. § 130.038 (Vernon Supp. 1995). Only the Proposition A "war chest" limitation is challenged in this case.

Missouri Ethics Commission or to contributors. Mo. Ann. Stat. § 130.130 (Vernon Supp. 1995). This is popularly known as a "spend-down provision" because candidates will most likely choose to spend all of their funds during the last days of the campaign rather than returning funds to contributors or turning them over to the state. The ability of a candidate to retain contributions for future elections is thus substantially limited.

The District Court held that the spend-down provision imposes a substantial burden on political speech by requiring that funds raised during a particular campaign be spent during the campaign. The court rejected the state's assumption that "blind support" in the form of a contribution that can be used in the current campaign or any future campaign "must constitute an impermissible attempt at improper quid pro quo influence." Shrink Missouri Gov't PAC, 892 F. Supp. at 1254. The state, on the other hand, argues that the spend-down provision does not limit speech but encourages it by requiring candidates "to do precisely what the contributors intend: to speak." State's Brief at 38. In our opinion, the state's argument makes an unwarranted assumption about the intention of campaign contributors and badly misrepresents reality. Some contributors undoubtedly do intend to give a candidate "blind support," and they do so without any hope of gaining improper influence with that candidate. Beyond that, we believe the state's characterization of the provision confirms the District Court's decision that it infringes the First Amendment. From the state's perspective, the provision is intended to require the candidate to speak in the current election. We note that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." Wooley v. Maynard, 430 U.S. 705, 714 (1977). From the appellees' perspective, the

provision limits the quantity of a candidate's speech in future elections. We note that this effect is identical to the effect of the expenditure limits addressed earlier in this opinion except that the impact of the provision is postponed to future elections. Whether we accept the state's or the appellees' characterization of the spend-down provision is irrelevant. Either way, we conclude that rights protected by the First Amendment are implicated and that the provision must be subjected to strict scrutiny.

While strict scrutiny may not always be fatal to a challenged restriction on speech, it is in this case. The state has not demonstrated that the spend-down provision is narrowly tailored to serve a compelling government interest. The state argues that this provision serves three interests.

> First, it attacks corruption and its appearance by (1) preventing the kinds of quids pro quo that occur when money is given to candidates in uncontested races, and (2) ensuring that the contributions limits of Proposition A . . . have a measurable effect on the political system . . . . Second, it preserves the integrity of the electoral process by (1) counterbalancing any discriminatory effects against challengers and in favor of incumbents that are created by Proposition A's contribution limits, (2) ensuring the opportunity of all citizens, not just those who have amassed large war chests in noncompetitive races, to participate in the political process as candidates, and (3) protecting the free speech interests of contributors. Third, it promotes speech and fairness, thus sustaining the active, alert

> responsibility of the individual citizen in our democracy.

State's Brief at 38-39 (citations omitted). At the outset, we note that any interest related to the effective operation of Proposition A's contribution limits fails to qualify as compelling because we have held that those limits are unconstitutional. See Carver v. Nixon, slip op. at 25. We further note that any interest defined by reference to funds raised in "noncompetitive" or "uncontested races" is unhelpful because the spend-down provision applies to funds raised in all campaigns; thus the provision is not narrowly tailored to serve such an interest. The sole remaining interests asserted by the state are that the provision "preserves the integrity of the electoral process by . . . protecting the free speech interests of contributors" and that it "promotes speech and fairness, thus sustaining the active, alert responsibility of the individual citizen in our democracy." Assuming that the state has articulated compelling interests, we conclude that the state has failed to demonstrate that the spend-down provision is narrowly tailored to do either of the things that the state asserts it will do. Although the state asserts that the provision protects the free speech interests of contributors, it is just as likely that the provision infringes those interests. Surely the contributor's political free speech interests are not well served if a candidate is compelled (1) to waste campaign contributions on unnecessary speech (in order to spend down the campaign's accumulated assets) or (2) to turn over those contributions to the Missouri Ethics Commission or return them to contributors. With respect to the provision's impact on the "active, alert responsibility of the individual citizen," the state's arguments are broad and conclusory. The state makes no attempt to show how the spend-down provision is narrowly tailored to serve that interest, saying only that "[c]itizens now may decline to participate in a

particular race . . . because of the overwhelming advantage carried over from another day" and that the "carryover restriction may well be the difference between having noncompetitive races, in which there is little or no speech, and having active campaigns in which there is uninhibited, robust, and wide-open debate on public issues," State's Brief at 45 (internal quotation marks and citation omitted). These statements fall far short of a showing that the spend-down provision is narrowly tailored to promote "the active, alert responsibility of the individual citizen in our democracy." We conclude that section 130.130 cannot withstand strict scrutiny and that it violates freedoms that the First Amendment protects.

III.

In sum, we hold that the expenditure limits of Senate Bill 650 and the spend-down provision of Proposition A restrict expression protected by the First Amendment and that the state has not demonstrated that these provisions are narrowly tailored to serve a compelling government interest. Furthermore, based on this Court's decision in Carver v. Nixon, slip op. at 25, which holds that Proposition A's contribution limits are facially unconstitutional, we conclude that those limits are necessarily unconstitutional insofar as they would limit contributions by candidates to their own campaigns. The judgment of the District Court enjoining the Attorney General of Missouri and the Chair of the Missouri Ethics Commission from implementing, enforcing, or acting in reliance on the challenged provisions is therefore affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATED DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SHRINK MISSOURI GOVERNMENT PAC, et al., Plaintiffs,	)	
vs.	)	No. 4:95CV815 CDP
JOHN MAUPIN, et al., Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on the parties' cross-motions for summary judgment. Plaintiffs' complaint seeks declaratory and injunctive relief enjoining defendants from enforcing certain portions of Missouri's recently effective campaign reform statutes, which plaintiffs contend violate the first amendment by impermissibly restricting political speech. The challenged provisions were contained in Senate Bill 650, which passed the state legislature in 1994 and became effective on January 1, 1995, and in Proposition A, which was passed by vote of the electorate on November 8, 1994, and which became effective that same day. Both Senate Bill 650 and Proposition A are "campaign reform" packages, in that they limit contributions, spending, and other actions that may be taken in political campaigns for Missouri elective offices.

The limits on campaign contributions contained in Proposition A have been upheld by the United States District Court for the Western District of Missouri, in

Carver v. Nixon, 882 F. Supp. 901 (W.D. Mo. 1995), and those contribution limits are not in issue in this suit. Instead, Plaintiffs challenge the spending limits contained in Senate Bill 650, the Proposition A limits on amounts a candidate may carry over from one election to the next, the application of Proposition A's contribution limits to a candidate's own money, and a provision of Senate Bill 650 that requires certain campaign advertisements to state that they are approved and authorized by the candidate.

Plaintiff Shrink Missouri Government PAC is a Missouri political action committee. Plaintiff W. Bevis Schock is a Missouri citizen who ran, unsuccessfully, for the Republican nomination for United States Congress in the 1992 primary. Plaintiff Frederick T. Dyer previously served in both the Missouri House of Representatives and Missouri Senate, and was defeated in his bid for reelection to the Missouri Senate in 1994. Both individual plaintiffs state that they wish to run for office in the future and that it wishes to continue to contribute to candidates for Missouri office in the future.

Defendants are John Maupin, sued in his official capacity as Chair of the Missouri Ethics Commission, and Jeremiah W. Nixon, sued in his official capacity as Missouri Attorney General. The Missouri Ethics Commission has certain statutory duties involved with enforcement of Missouri campaign laws, including collection of campaign financial reports and referral of campaign finance and reporting violations for criminal prosecution.

On May 10, 1995, the undersigned entered a Temporary Restraining Order enjoining defendants from enforcing the challenged statutes, and that TRO was later converted to a preliminary injunction. The parties jointly

proposed that this case be resolved on cross-motions for summary judgment rather than through trial.

I. General Principles

In determining whether summary judgment should issue, the facts and inferences from these facts are viewed in the light most favorable to the non-moving party and the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party as met this burden, however, the non-moving party may not rest on the allegations in its pleadings but by affidavit and other evidence must set forth specific facts showing that a genuine issue of material fact exists. Fed. R. Civ. P. 56(e). Although some factual evidence has been presented here, the issues presented are largely ones of law, and there are no genuine factual issues requiring resolution. Thus, decision on summary judgment is appropriate.

In their motion for summary judgment, plaintiffs argue that all the provisions violate the first amendment and must be enjoined. Defendants argue that the regulations are not content based,[1] and therefore need only a rational basis

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[1]Actually, defendants state that they are not arguing this position because the Court stated, in its order granting preliminary relief, that the restrictions are content based. Defendants assert that absent that statement, they would be arguing that the restrictions are content neutral. The Court does not understand why a defendant would so readily abandon a position it

to be held constitutional, and, alternatively, that all the provisions withstand strict scrutiny in any event, so that none of them violate the first amendment.

In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court established the framework for first amendment analysis of financial and disclosure limitations on political campaigns. Buckley upheld the contribution limits at issue in that case, while finding that limits on independent expenditures, restrictions on a candidate's own spending, and limits on overall campaign spending violated the first amendment. The Supreme Court in Buckley upheld other portions of the law before it, including a public financing scheme for presidential campaigns that was tied to voluntary spending limits. The application of Buckley and its progeny to the facts of this case determines whether Missouri's campaign reforms are constitutional. Under Buckley, content-based regulations are subject to strict scrutiny.

The test for whether a regulation is content neutral or content based is the "commonsense" determination of whether "the message conveyed determines whether the speech is subject to regulation." See Whitton v. City of Gladstone, 54 F.3d 1400 (8th Cir. 1995), citing City of Cincinnati v. Discovery Network, Inc., 113 S.Ct. 1505, 1506-17 (1993). Here, all the challenged regulations by definition apply only to political speech. The spending and contribution limits apply only to contributions or expenditures made for the purpose of advocating the election or defeat of a particular candidate. As the Eighth

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purportedly deems correct when no final determinations have been made and no final relief has been granted, and therefore will consider that defendants, in fact, are still urging this position.

Circuit stated in Day v. Holahan, 34 F.3d 1356, 1361 (8th Cir. 1994), cert. denied, 115 S. Ct. 936 (1995), ". . . expenditures of any other nature, supporting the expression of any sentiment other than advocating the defeat of one candidate or the election of another, do not trigger" the restrictions. The provisions apply only to political speech, and not to any other speech. They are, therefore, content based. Additionally, the provision requiring only literature which makes statements about another candidate to carry the "approved and authorized" wording (§ 130.031.12, R.S.Mo.) is explicitly content based. See also McIntyre v. Ohio Election Commission, 115 S. Ct. 1511, 1518 (1995).

In McIntyre, the Supreme Court stated: "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." 115 S. Ct. at 1519, citing First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978). Thus, this Court must apply "the most exacting scrutiny" to the statutes now before it. See also Turner Broadcasting System v. Federal Communications Corporation, 114 S. Ct. 2445, 2459 (1994).

Although defendants have argued a number of potential justifications for the laws at issue here, they have not provided any evidence that either the state legislature or the electorate actually considered those justifications in enacting Senate Bill 650 or Proposition A. Plaintiffs urge that "after-the-fact rationalizations" cannot be sufficient to withstand strict scrutiny, and that defendants must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." United States v. National Treasury Employees Union, 115 S.Ct. 1003, 1017 (1995), citing Turner Broadcasting System, 114 S.Ct at 2470.

Plaintiffs presented affidavits to the effect that they desire and need to violate the provisions to run effective campaigns or to effectively support the candidates of their choice. Defendants, on their initial motion for summary judgment, presented no evidence by way of affidavit or otherwise. Defendants' brief in opposition to plaintiffs' motion for summary judgment, however, attached certain exhibits. Defendant's exhibits do nothing to prove or disprove either defendants' or plaintiffs' case. There is no evidence provided that the legislature or the electorate actually considered or even had available the reports provided. None of the evidence presented gives rise to any genuine dispute of a material fact.

If plaintiffs are correct in their contention that the state must prove that the legislature and the electorate explicitly considered the specific wrongs now claimed to be remedied by the statutes, either by including "findings" in the laws themselves or by, for example, presenting evidence of legislative history or testimony about the intent of the electorate or of the legislature, then defendants clearly have not met that burden. The Court does not agree, however, that Supreme Court precedent requires that type of specific, historical factual proof. States such as Missouri, where the legislature does not collect or preserve legislative history, could never meet the burden plaintiffs urge. Thus, the undersigned will give the state the benefit of the doubt, and will assume, without finding, that in fact the justifications offered are the reasons for the passage of the laws.

The State asserts that four closely-related interests justify the statutory scheme at issue here: (1) preserving election integrity, (2) preventing corruption, (3) preventing false statements, and (4) promoting individual participation in the election process.

That states possess compelling interest in protecting the integrity of the electoral process and preventing corruption in the political process was recognized by Buckley v. Valeo, 424 U.S. 1 (1976). Similarly, in First Nat'l Bank v. Bellotti, 435 U.S. 765, 788-89 (1978), the Court recognized the state's interest in "preserving the integrity of the electoral process, preventing corruption, and sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." Defendants argue that Missouri wishes to "encourag[e] and allow[ ] all citizens to participate in electoral politics", and that "the states do have an interest in protecting the free speech and election rights of all their citizens, to prevent their being trampled upon by the wealth that can be amassed by a few." As political or policy goals these statements cannot be seriously argued with. When the state's promotion of such goals interferes with political speech, however, these public policies must represent compelling needs, and the statutory scheme must be closely tailored to address those needs.

II. The Statutes at Issue

Plaintiffs' complaint alleges that four types of campaign restrictions violate their first amendment rights. The challenged provisions are[2]:

1. Provisions that limit the amount of money a candidate for public office may contribute to his or her own

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[2]For ease of reference, the Court uses the numbers assigned to these provisions for their inclusion in the Revised Statutes of Missouri, even though Proposition A has not actually been printed in that official code yet. Both Proposition A and Senate Bill 650 may be found in the unofficial annotated statutes, V.A.M.S., at Ch. 130.

campaign. This restriction results from the interplay of the pre-existing definition of "contribution" contained in § 130.011(12)(a), and the limits on contributions contained in § 130.100 (Prop. A).

2. Section 130.130 (Prop. A), which requires that campaign funds in excess of expenditures made for any particular election must be returned to contributors or forfeited to the Missouri Ethics Commission.

3. Provisions that require a candidate to comply with spending limits or face one of two alternatives: not accept contributions from anyone other than individuals and file daily expenditure reports once expenditures exceed the limits (§ 130.052 of SB 650), or pay a "surcharge" to the Missouri Ethics Commission on amounts spent that exceed the limits (§ 130.053 of SB 650).

4. Subsection 12 of § 130.031 (SB 650), which requires certain types of campaign literature to contain a statement that the literature was "approved and authorized" by the candidate.

A. Candidates' Own Funds

The basic Proposition A limits on contributions contained in § 130.100 were recently upheld in Carver v. Nixon, 882 F. Supp. 901 (W.D. Mo. 1995). The parties to that case did not argue that Proposition A limited the amounts that a candidate could contribute of his or her own money to a campaign. In other words, in that case the Western District court simply upheld the limitations on contributions that persons other than the candidate could give to the candidate. In doing so, Judge Clark stated

> It is true that Proposition A does not limit the amount of personal funds a candidate may contribute to his or her own campaign and it does not limit contributors in their own personal direct expenditures made in promotion of a candidate. These types of limits are not at issue in this case. However, the Court notes that such limits on the candidate and on contributors would directly restrict the candidate's and contributors' own political speech and would run afoul of the protections of the First Amendment, while the limits on contributions at issue here only limit indirect speech of the contributor.

Carver, 882 F. Supp. at 906 (emphasis added). Defendants argue that this statement is a holding that the law does not limit the amount a candidate may spend of his or her own money. As Judge Clark stated, the issue was not before him, and it clearly is before the undersigned. Defendants neither consent to plaintiffs' requested injunction nor concede that Judge Clark's interpretation is correct, but simply state in their motion for summary judgment (for apparently the first time), that they would not argue the issue in this case. The issue has been properly presented in this case and is appropriate for determination on the cross-motions for summary judgment.

Section 130.011(12)(a), R.S.Mo., defines contribution to include "A candidate's own money or property used in support of his candidacy other than expense of his food, lodging, travel, and payment of any fee necessary to the filing for public office." This definition existed before Senate Bill 650 and Proposition A were passed, and nothing in Proposition A attempted to change or modify the pre-existing definition of contribution. The

commonsense reading of the statute, therefore, provides that the Proposition A contribution limits upheld in Carver also apply to contributions or direct expenditures made by a candidate with his or her own money.

As Buckley held, and as Judge Clark recognized in Carver, such a restriction is clearly unconstitutional, as it limits a candidate's own direct personal speech, by limiting the amount of a person's own funds that he or she can spend in support of his or her own candidacy. There can be no compelling state justification for this direct limitation on a candidate's own political speech, and the defendants here have made no attempt to provide any justification. When the definition is applied to the contribution limits that have been previously upheld, it impermissibly interferes with a candidate's first amendment rights, and is unconstitutional. Therefore, plaintiffs are entitled to the injunction they seek preventing defendants from applying the definition in § 130.011(12)(a) to the contribution limits of § 130.100 of Proposition A.

B. Spending Limits

Senate Bill 650 established spending limits for campaigns for all state elected offices in Missouri. The limits vary depending on the office sought. The parties argue about whether these limits are voluntary or coercive. Under § 130.052.1, when a candidate files for office he or she must file an affidavit stating whether or not the candidate agrees to abide by the campaign spending limits established by the statute.[3] If a candidate files an affidavit refusing to comply with the limits, then that candidate may only accept contributions from individuals. The non-

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[3]If that candidate's opponent later elects not to comply, the candidate may reconsider the declaration.

complying candidate may not accept contributions from PACs, parties, corporations, labor unions, or other candidates' committees, although a candidate who files an affidavit of intent to comply with the spending limits may accept such contributions. § 130.052.3. Additionally, a candidate who elects not to comply must, as soon as the spending limits are exceeded, file daily disclosure reports with the ethics commission. § 130.052.3. Any candidate who agrees to comply with the limits and then exceeds them must pay a "surcharge" to the ethics commission: the surcharge is a sliding percentage of the amount by which the limits were exceeded, ranging from twenty five percent of the overage to one hundred percent. See § 130.053.

Defendants here argue that these spending limits are voluntary ceilings and are therefore constitutionally permissible. Defendants argue that the statutory scheme merely provides incentives for complying with the campaign spending limits, while plaintiffs argue that the consequences of exceeding the limits or not agreeing to them are so Draconian that the limits are not voluntary.

Buckley v. Valeo upheld voluntary spending limits only where the reward for adhering to the limits was the receipt of public campaign financing. In Vote Choice, Inc. v. DiStefano, 4 F.3d 26 (1st Cir. 1993), the First Circuit upheld a spending limits scheme that was found to be voluntary, but noted that "there is a point at which regulatory incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive." Id. 4 F.3d at 38. The Eighth Circuit recently found certain spending limits unconstitutional even where they were tied to a public financing scheme. Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994).

In finding the bulk of the spending limits before it in Buckley unconstitutional, the Supreme Court noted that: "It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates." There is no doubt that the spending limits at issue here also clearly restrict the quantity of political speech. Like the limits overturned in Buckley, the limits here do not promote the State's interest in preventing quid pro quo corruption, because the limits apply only to expenditures made by a candidate or his committee. Persons wishing to exert corrupt influence over a candidate could still spend money on behalf of a candidate's party or in favor of issues closely identified with a candidate, without coming within the limits. Cf. Buckley, 424 U.S. at 45.

The Missouri spending limits contained in Senate Bill 650, unlike those in the cases relied on by defendants, are not tied in any way to public campaign funding, and Missouri provides no matching or public funds to any candidates. Cf., Day v. Holahan, supra; Wilkinson v. Jones, 876 F. Supp. 916, 927 (W.D. Ky. 1995) (Kentucky has compelling interest in encouraging candidates to accept public financing). Instead, the types of entities who can contribute to the candidates is limited if the spending limits are not followed, but unlimited if they are. The Court agrees with plaintiffs that the statutory scheme is coercive, because it withdraws an important source of private campaign funding otherwise available to candidates, but provides no method, such as public funding, of replacing that forfeited funding. Buckley's rationale for upholding spending limits in return for public financing was not based solely on the fact that the limits were voluntary: it was also based on the fact that encouraging use of public financing supported the goal of reducing corruption or the appearance of corruption, and that, of course, public financing of

campaigns promotes, rather than restricts, political speech. Missouri's scheme has no such saving grace. The disparities created by the statutory scheme are so profound that they must be viewed as coercive. Similarly, the requirement to file daily reports once the spending limits are exceeded also provides only a penalty.

Defendants' briefs decry the large increase in campaign spending, and assert that the citizens and legislature recognized a legitimate interest in slowing or halting the increasing costs of political campaigns. Buckley specifically held that the mere growth in the cost of election campaigns in itself provides no basis for restrictions on the quantity of campaign spending. Id. at 57. Defendants argue that times have changed since Buckley, because now the amounts spent on campaigns are even higher than anyone could have anticipated at the time of Buckley. This is a distinction without a difference, and defendants have failed to show that the increase in total dollars spent on campaigns somehow automatically increases corruption or decreases electoral integrity.

Defendants also argue that the state's interest in promoting individual participation in the electoral process is directly related to the total expenditures of an election, and that reducing the power of the wealthy to influence the electoral process is a legitimate goal. First, the contribution limits upheld in Carver appear to go a long way to promote this goal, and it is not at all clear that the spending limits add much, if anything, to this, except to the extent they apply to a candidate's own money. Buckley, of course, clearly prohibited any limits on a person's ability to spend his or her own money on his or her own campaign, and defendants have provided no rationale for why the world has changed since Buckley in this respect. Defendants' argument that the State has a compelling interest in

"sustaining individual participation in the election process", as defendants' brief explains this interest, runs afoul of Buckley's holding that a government may not restrict the free speech rights of some elements of society in order to enhance the relative voices of others. The idea that "leveling the playing field" between the rich and the poor is a compelling justification for interference with core political speech has never been accepted by any court.

Defendants rely on the white primary and poll tax cases to construct an argument that, in today's political climate, the only way to protect the value of one person's individual vote is to limit total campaign spending. These cases, and their concern that the state not burden political speech, do not support defendants' arguments. The spending limits here do nothing to increase the power of a single voter. To the extent the state has any legitimate interest in equalizing the roles of all its voters, the contribution limits upheld in Carver promote that goal. The spending limits here clearly violate the rule of Buckley, and cannot withstand strict scrutiny.

C. The "Spend down" Provision

Proposition A provides, in § 130.130, that:

> Within ninety days of the election to fill the office for which the candidate has filed or declared, said candidate and that candidate's campaign committee shall either
> (a) Turn over to the state of Missouri for the benefit of the Missouri Ethics Commission, or
> (b) Return to those persons reported as contributors to the candidate's campaign,

> any balance of campaign funds in excess of expenses incurred for the campaign, except for an amount no greater than ten times the individual contribution limit set forth above for that particular office.

Thus, Proposition A does not allow for carryover from one campaign to the next of any but very small amounts of campaign funds.[4]

Defendants argue that this provision does not restrict speech, but really encourages speech, by making candidates for public office use the funds they have raised for the purposes for which they were raised -- the particular election and office of the current campaign. Defendants assert that this provision gives the candidate two choices: increase his or her political speech by spending all the raised funds, or give those funds back to the contributors, who can then re-give the money (and, therefore, speak again) during the next campaign.[5] Defendants assert that

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[4]Senate Bill 650 contained a similar provision, but the SB 650 version allows a longer time period for the return and allows the candidates or their committees to keep a significantly larger amount of excess funds. See § 130.038.

[5]Defendants assert that no candidate will ever turn the money over to the ethics commission, but instead will always give it back to contributors, who can then give it back in the next campaign. The statute does not provide any method for deciding which contributors receive refunds, and defendants' argument assumes that a candidate will select among the contributors to determine who should receive a refund, rather than attempting to

this provision protects the integrity of the election process because it forces candidates to use the funds for the purposes intended by the contributors (the particular election), rather than for amassing a war chest for future campaigns. Defendants further argue that the carryover restrictions prevent quid pro quo corruption through unchallenged incumbents' amassing large war chests, and that it levels the playing field between rich and poor and between challengers and incumbents.

The parties have cited only one case dealing with a provision in any way similar to that here. In Service Employees International Union v. Fair Political Practices Commission, 721 F.Supp 1172 (E.D. Cal. 1989), aff'd 955 F.2d 1312 (9th Cir. 1992), cert. denied 112 S. Ct. 3056 (1992), the California District Court found a somewhat similar "war chest" restriction unconstitutional. The California proposition provided that any campaign funds raised before January of 1989 could be used only for purposes other than to support or oppose a candidate for elective office. The court found that the provision had no effect on potential corruption in the political process and that the goal of levelling the playing field between rich and poor candidates was invalid, and concluded that the provision violated the first amendment. The undersigned must reluctantly agree that the Proposition A provision at issue here meets the same fate.

The "spend down" limits clearly limit political speech by telling a candidate when he or she must speak, that is, by stating that the money must be spent in the particular campaign in which it was raised. Defendants assume that contributors always wish to contribute to a candidate for a particular campaign, and that a general

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refund the contributions in some pro-rata manner.

contribution to a candidate, which that candidate could use for current or future campaigns, must constitute an impermissible attempt at improper quid pro quo influence. The Court disagrees, and thinks that it is entirely legitimate for a contributor to give money to a candidate because the contributor supports that candidate, in whatever race the candidate may later choose to run. This type of "blind support" does not necessarily imply that the contributor expects favors, but rather that the contributor supports the candidate because of the candidate's particular views or politics -- the very essence of protected political speech. The dangers of quid pro quo corruption are adequately addressed by the overall contribution limits that were upheld in Carver: the spend down limits do nothing to further the goal of preventing corruption.

It seems clear that the desire to limit the power of incumbency may be the real goal of the spend-down requirement, but the provision would only benefit incumbents who had not faced serious competition in past elections; it does nothing to limit the power of incumbents who face tough elections in each race and therefore presumably cannot amass large war chests. Thus, even if limiting the power of incumbency were a compelling interest (which Buckley appears to deny), this provision is not narrowly tailored to serve that interest. Additionally, as set forth above, to the extent the provision is justified because it "equalizes" the spending power of rich and poor, it runs afoul of Buckley's clear statement that that is not a compelling justification for interference with first amendment rights.

D. The "Approved and Authorized" Requirements

Senate Bill 650 added subsection 12 to § 130.031. That subsection provides that:

> . . . any printed or broadcast matter . . . which contains allegations regarding the actions, inactions, beliefs, behavior or other aspects of any candidate for office, other than the candidate or candidate committee which issued such printed or broadcast matter, shall contain . . . a statement that . . . the information contained in the advertisement has been approved by the candidate on whose behalf the printed or broadcast matter was issued. Such statement shall be in the following form: "The contents of this advertisement have been approved and authorized by . . ." [the candidate on whose behalf the advertizement was issued].

A violation of this statute is a misdemeanor. See § 130.081. Even before the passage of SB 650, § 130.031 contained requirements that all print or broadcast matter relating to candidates or ballot issues contain a "paid for by" legend identifying the source of the matter. See § 130.031.8 and 9. Plaintiffs here are not challenging that "paid for by" requirement.[6]

In McIntyre v. Ohio Election Commission, 115 S. Ct. 1511 (1995), the Supreme Court held that an Ohio

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[6]Defendants argue that this failure indicates the invalidity of plaintiffs' challenge to the other provisions. The Court agrees that McIntyre calls into question the "paid for by" requirement, but that issue is not before the Court. Plaintiffs are not required to challenge all potentially unconstitutional provisions.

statute that prohibited the distribution of anonymous campaign literature violated the first amendment. The Court found that the State of Ohio could not justify its prohibition of anonymous handbills based on an interest in preventing fraud or libel or an interest in providing the electorate with relevant information. The Court noted that the Ohio statute would reach handbills that were not even arguably false or misleading and that if false or misleading advertisements were truly the target of the statute, it should have been more narrowly tailored to reach only those advertisements. Additionally, the Court found that the "simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." McIntyre, 115 S. Ct. at 1520.

There can be no doubt that the Missouri provision requires a speaker to "make statements or disclosures she would otherwise omit." The defendants argue that the Missouri statute at issue here is narrowly tailored to achieve a compelling state interest in deterring false statements by candidates for public office and making those candidates accountable for materials put out by their campaigns. The undersigned agrees with defendants that the State may legitimately wish to protect the public from the evil hypothesized, specifically, that a candidate's campaign committee might make false statements about an opponent, which the candidate could then deny having approved. However, the Court finds that the State has failed to show either that this desire rises to the level of a compelling need or that this statute is narrowly tailored to meet that need. There has been absolutely no showing by the State that false advertising by campaign committees is a major electoral problem. The statue by its terms applies only to statements made by a candidate or a candidate's campaign committee. It does not apply to statements made by

political action committees, industry lobbyists, "public interest" groups or others, anonymous or named, which are surely the source of most "deniable" negative campaigning. The State has provided no evidence of even a single instance where a campaign committee made a false statement which the candidate later disavowed. Nor has the state provided any evidence of an increase in false advertising or fraud in its political elections. It has simply decried "negative campaigning", in general, and while the Court might agree that negative campaigning is distasteful, that is not a sufficient basis for interfering with core first amendment rights.

Moreover, like the Ohio statute involved in McIntyre, and like the earlier California ordinance invalidated in Talley v. California, 362 U.S. 60 (1960), this statute "contains no language limiting its application to fraudulent, false, or libelous statements. McIntyre, 115 S. Ct at 1517. To the extent Missouri seeks to justify this regulation as a means of preventing fraud and false statements, it must fail for the same reason that the Ohio statute did. As in McIntyre, this provision applies "even when there is no hint of falsity or libel." Id.

Defendants argue that, unlike the Ohio statute in McIntyre, the Missouri statute applies only to elections of public officers, and not to ballot issues. Although Missouri's statute is admittedly narrower than Ohio's, the undersigned can find no constitutional significance in this distinction, as the provision still is not narrowly tailored to meet the need. The State also argues that McIntyre is distinguishable because the Missouri statute does not apply to anonymous advertisements at all, because Missouri candidates are already required to include a statement that the material was paid for by whatever campaign committee or candidate actually paid for the advertisement. It seems

that to whatever extent the state wishes to impose accountability and lessen the opportunity for deniability, the "paid for by" requirement promotes that goal, without the need for the added "approved and authorized" language. Although Missouri, unlike Ohio, has no other specific prohibition on false statements made during political campaigns, Missouri common law recognizes the torts of defamation and fraud, and those doctrines are not abrogated merely because a political campaign is involved. In any event, if this statute is Missouri's "first line of defense" against fraud and false statements in political campaigns, it is unlikely to promote those goals. Thus, the Court must conclude under McIntyre that the burden imposed on political speech by the "approved and authorized" language does not withstand strict scrutiny. The statute violates the first amendment and the Court will enter the injunctive relief requested.

III. Conclusion

The patchwork of Missouri campaign reforms passed in 1994 indicates a strong desire by the legislature and the public to bring some limits to the increasingly costly and negative world of political campaigns. No one could seriously disagree, as a policy matter, that negative campaigning does not benefit the public discourse and that expenditures of unlimited amounts of money on political campaigns is not a sensible use of society's resources. That defendants, the state legislature, and a majority of the electorate may agree with those policy statements, however, does not entitle the state to interfere with the first amendment rights of persons such as plaintiffs. Buckley established very clear rules regarding what justifications may be sufficient for interference with core political speech, and the Missouri statutory scheme falls far short of meeting those tests. There are no genuine disputes of material fact

remaining in this case, and plaintiffs are entitled to the permanent injunctive relieve which they seek.

Accordingly,

IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment [#19] is **GRANTED** and defendants' motion for summary judgment [#18] is **DENIED**.

A separate Judgment in accordance with this memorandum and order is entered this same date.

CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 7th day of July, 1995.

UNITED STATED DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SHRINK MISSOURI GOVERNMENT PAC, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 4:95CV815CDP
JOHN MAUPIN, et al.,	)	
Defendants.	)	

JUDGMENT

In accordance with the memorandum and order entered this same date,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs shall have summary judgment against defendants, and that defendants, their successors, agents and employees, are **PERMANENTLY ENJOINED and RESTRAINED** from the following:

1. Implementing, enforcing or acting in reliance upon § 130.130 of Proposition A and § 130.052, § 130.053, and § 130.031.12, R.S.Mo. (1995).

2. Applying the definition of "contribution" contained in § 130.011(12)(a), R.S.Mo., to the contribution limits contained in § 130.100 of Proposition A, that is, applying or enforcing the statute so that candidates for office would be limited in the amounts they may personally contribute to or spend on behalf of their own campaigns.

CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 7th day of July, 1995

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States. Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Section 130.052. Revised Statutes of Missouri:

Candidate to file affidavit, procedure--compliance with voluntary expenditure limits, release--failure to comply, restrictions--expenditures, how calculated, limits--certain offices.

1. Campaign expenditures shall be limited pursuant to this section. Each candidate date for elective office shall file an affidavit with the secretary of state, at the same time such candidate files for office, stating whether or not the candidate agrees to abide by the campaign expenditure limits established pursuant to this section. Copies of the affidavit may be used by the candidates to inform the public of a candidate's intent of compliance or noncompliance with the expenditure limits so established. The secretary of state shall forward the affidavits to the ethics commission for administration of the expenditure limitation provisions of this chapter.

2. A candidate who has agreed to abide by the voluntary expenditure limits who has as an opponent on the ballot in the next election who has refused to comply with the voluntary expenditure limits by the date of filing for the

office shall have five business days after the closing date of filing for office to decide whether to comply with the expenditure limits or not, and if the candidate decides not to comply, the candidate shall be released from the voluntary expenditure limits and surcharges established in this chapter. If a successful primary electoral candidate has not agreed to abide by the voluntary limits, any candidate who has agreed shall have five days following the primary to reject the agreement and be released from the expenditure limits and surcharges established in this chapter.

3. Any candidate who has filed an affidavit refusing to comply with the expenditure limits established in this chapter shall be prohibited from accepting contributions from any source other than individuals, and such contributions from individuals shall be limited to the applicable contribution limits established in section 130.032. In the event the candidate receives a contribution from any other source other than individuals or receives an individual contribution greater than the allowable limit, the candidate shall have ten business days to return the contribution, or the contribution shall escheat to the state. No candidate found to have purposely violated this subsection shall take office. In addition a candidate who refused to comply with the expenditure limits and exceeds such limits shall be required to file daily disclosure reports with the ethics commission beginning with the first notice from the commission that such candidate has exceeded the allowable expenditure limit.

4. For the purposes of this section, the expenditure limit shall be the aggregate total of all expenditures made which are reported pursuant to sections 130.041 and 130.051, beginning with the opening of filing and continuing to the primary election day and beginning

with the day after the primary election and continuing to the general election day, except any expenditure made for accounting or bookkeeping services necessary for compliance with the expenditure limit and campaign disclosures shall not count toward the expenditure limits.

5. Any expenditure made for broadcast or print media advertisement shall be deemed to have been expended at the time the advertisement appears in print or is broadcast and shall be credited toward the expenditure limit allowed at such time.

6. Any purchases or expenditures for printed campaign material, campaign media, campaign consultants, campaign employees or campaign materials which are prepaid before the filing date and which would be distributed or used during the periods defined in subsection 4 of this section shall be included in the amounts allowed in this section. The candidate shall report all such purchases or expenditures to the commission by the date of filing for the office to which election is sought.

7. Each chamber of the general assembly shall adopt rules governing the appropriate use of materials printed at the state's expense, and further provide that those materials not be used in conjunction with election activities. The ethics commission shall review complaints alleging violations of this subsection as provided in section 130.054.

8. To be in compliance with the expenditure limits established pursuant to this section, the following expenditure limits per election may not be exceeded by a candidate committee:

(1) Thirty thousand dollars for candidates for the office of state representative;

(2) One hundred thousand dollars for candidates for the office of state senator;

(3) Seven hundred fifty thousand dollars for candidates for the office of lieutenant governor, secretary of state, state treasurer, attorney general and state auditor;

(4) One million five hundred thousand dollars for candidates for the office of governor;

(5) Thirty thousand dollars for any office of an electoral district, ward or other unit if the population of such electoral district, ward or other unit according to the latest decennial census is under one hundred thousand in population, except that the expenditure limit under this subsection for a candidate committee where the election is for any office of a city with a population of at least fifty thousand inhabitants and the city charter of such city requires that the election shall be a nonpartisan election with no primary election shall be sixty thousand dollars;

(6) One hundred thousand dollars for an office of an electoral district, ward or other unit if the population of such electoral district, ward or other unit according to the latest decennial census is at least one hundred thousand but less than two hundred fifty thousand in population; and

(7) Five hundred thousand dollars for an office of an electoral district, ward or other unit if the population of such electoral district, ward or other unit according to the latest decennial census is at least two hundred fifty thousand in population.

Section 130.053, Revised Statutes of Missouri:

Candidates subject to a surcharge on excess expenditures, when, amount--ethics commission to collect debt.

1. Each candidate for office who has filed an affidavit agreeing to comply with the expenditure limits shall be subject to a surcharge on all expenditures made in any election which exceed the expenditure limits established in section 130.052. The expenditure reports required by this chapter shall be examined by the ethics commission, and where expenditures are made which exceed the limits, the commission shall notify the candidate of the excess amount. The candidate shall, within thirty days of receiving such notice, remit to the ethics commission the following amounts:

(1) Twenty-five percent of the excess expenditures if the expenditures are between zero and five percent over the prescribed limit;

(2) Fifty percent of the excess expenditures if the expenditures are more than five but not greater than ten percent over the prescribed limit;

(3) Seventy-five percent of the excess expenditures if the expenditures are more than ten but not greater than fifteen percent over the prescribed limit; and

(4) One hundred percent of the excess expenditures if the expenditures are greater than fifteen percent of the prescribed limit.

2. The commission shall transmit all proceeds received pursuant to this section to the director of revenue for deposit in the general revenue fund of the state treasury. The commission shall send a receipt to each candidate

which remits payment of surcharges pursuant to this section.

3. No candidate shall take office until payment is made of the surcharges. Any candidate and any other person owing a surcharge shall be personally liable for the payment of the surcharge. The commission shall pursue all necessary means to collect the debt from the candidate or any other person liable. The debt shall constitute a debt owed to the state and be enforceable as provided by law, including but not limited to chapter 143, RSMo.

Section 130.130. Revised Statutes of Missouri:

Excess Campaign Contributions: Within ninety days of the election to fill the office for which the candidate has filed or declared, said candidate and that candidate's campaign committee shall either;

(a) Turn over to the state of Missouri for the benefit of the Missouri Ethics Commission, or

(b) Return to those persons reported as contributors to the candidate's campaign, any balance of campaign funds in excess of expenses incurred for the campaign. Except for an amount no greater than ten times the individual contribution limit set forth above for that particular office.

(2)

Supreme Court, U.S.
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No. 95-1524

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JEREMIAH W. NIXON, Attorney General of Missouri, and JOHN MAUPIN, Chairman, Missouri Ethics Commission,
Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC, a political action committee, W. BEVIS SCHOCK and FREDERICK T. DYER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals hold correctly that limits on candidates' campaign expenditures must be narrowly tailored to achieve a compelling state interest.

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IN THE

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No. 95-1524

JEREMIAH W. NIXON, Attorney General of Missouri, and JOHN MAUPIN, Chairman, Missouri Ethics Commission,
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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-16) is reported at 71 F.3d 1422 (8th Cir. 1995). The opinion of the district court (Pet. App. A-17 to A-38) is reported at 892 F.Supp. 1246 (E.D. Mo. 1995).

JURISDICTION

The court of appeals entered its judgment on December 19, 1995. The petition for a writ of certiorari was filed on March 18, 1996, and it was placed on the docket on March 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In addition to sections 130.052, 130.053, and 130.130 of the Revised Statutes of Missouri (Pet. App. A-41 to A-46), this case also involves sections 130.011(12)(a), 130.032.1, 130.038, and 130.100 of the Revised Statutes of Missouri (Res. App. 1a-4a).

STATEMENT

Missouri limits candidates' total campaign expenditures, prohibits candidates from carrying over more than $1000, $2000, or $3000 of campaign funds from one election to another, and prohibits candidates from spending more than $100, $200, or $300 of their personal resources to run for state and local office. The court of appeals held that the first two limits on candidates' political expenditures violate the First Amendment because the state had "not demonstrated that these provisions are narrowly tailored to serve a compelling government interest." Pet. App. A-16. On the basis of its decision in a companion case that certain contribution limits violate the First Amendment, the court of appeals also held that these contribution limits were unconstitutional as applied to restrict candidates' spending of personal funds in support of their own campaigns. Pet. App. A-16; *see Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3561 (U.S. Feb. 20, 1996) (No. 95-1258).

1. These three limits on candidates' political expenditures are the product of two sets of 1994 amendments to Missouri's Campaign Finance Disclosure Law. R.S. Mo. §§ 130.011 *et seq.* In July 1994, the Missouri legislature enacted a measure (Senate Bill 650) that limits campaign contributions and expenditures. On November 8, 1994, the Missouri electorate approved a ballot initiative (Proposition A) that also limits campaign contributions and expenditures. The Missouri Attorney General

ruled that Proposition A supersedes Senate Bill 650 to the extent its provisions are more restrictive and that otherwise Senate Bill 650 remains in effect.

a. *Limits On Candidates' Total Campaign Expenditures:* Senate Bill 650 limits the amounts that candidates can spend to run for state and local office. R.S.Mo. § 130.052. Candidates must file an affidavit indicating whether they intend to comply with expenditure limits that range from $30,000 to $1,500,000. R.S.Mo. §§ 130.052.1, 130.052.8. Candidates who reject these limits are subject to two penalties. First, they can accept contributions only from individuals, but opposing candidates who agree to abide by the expenditure limits can accept contributions from political parties, political action committees, corporations and labor unions, as well as from individuals. R.S.Mo. § 130.052.3. Second, candidates who reject the spending limits must file daily reports of contributions and expenditures with the Missouri Ethics Commission after their expenditures exceed the prescribed limit, but candidates who accept the expenditure limits do not have to file daily reports. *Id.* Candidates who reject the spending limits are subject to criminal sanctions for accepting contributions from sources other than individuals and for failing to file daily disclosure reports. R.S.Mo. § 130.081.

b. *Limits on Spending Carryover Campaign Funds:* Proposition A regulates the timing of campaign expenditures and restricts the amount of campaign funds that may be spent in subsequent elections. It provides that every candidate, within 90 days of an election, "shall" either turn over to the Missouri Ethics Commission or return to the contributors "any balance of campaign funds in excess of expenses incurred for the campaign, except for an amount no greater than ten times the individual contribution limit" applicable to that office. R.S.Mo. § 130.130. Given individual contribution limits of $100, $200, or $300 (R.S.Mo. § 130.100), candidates cannot retain more than $1000, $2000, or $3000 of the funds

raised in one campaign and cannot carry these funds over for use in a subsequent campaign to express their political views.[1]

c. *Limits on Campaign Expenditures by Candidates from Their Personal Resources:* Proposition A limits the amount of their own funds that candidates may spend to run for election. It limits "contributions" to candidates for office in Missouri on a sliding scale from $100 to $200 to $300 per election cycle. R.S.Mo. § 130.100. The term "contribution" includes "[a] candidate's own money or property used in support of his candidacy." R.S.Mo. § 130.011(12)(a). As a result, with the exception of expenses for "food, lodging, travel, and payment of any fee necessary to the filing for public office," *id.*, Proposition A prohibits candidates for various elective offices in Missouri from spending more than $100, $200, or $300 of their own funds to support their campaigns.[2]

2. The district court held first that contribution limits as applied to limit contributions or direct expenditures by candidates with their own money violate the First Amendment. Pet. App. A-26. It found that limits on "a candidate's own direct personal speech" are "clearly unconstitutional" under *Buckley v. Valeo,* 424 U.S. 1 (1976) (*per curiam*), and that Missouri had made "no attempt to provide any justification" for "this direct limitation on a candidate's own political speech." *Id.*

The district court also held that the limits on candidates' total campaign expenditures "clearly violate the

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[1] Senate Bill 650 also limits candidates' expenditure of carryover campaign funds. R.S.Mo. § 130.038. These provisions are superseded by the more restrictive provisions of Proposition A.

[2] Senate Bill 650 also establishes contribution limits that apply to contributions by candidates to their own campaigns. R.S.Mo. §§ 130.011(12)(a), 130.032.1. These limits, however, are superseded by the more restrictive contribution limits of Proposition A.

rule of *Buckley*, and cannot withstand strict scrutiny." Pet. App. A-30. Missouri's spending limits "restrict the quantity of political speech" and, like the spending limits held invalid in *Buckley*, do not promote any state interest "in preventing *quid pro quo* corruption." *Id.* at A-28. The state's statutory scheme is "coercive[] because it withdraws an important source of private campaign funding otherwise available to candidates." *Id.* It cannot be justified under "*Buckley's* rationale for upholding spending limits in return for public financing" because "Missouri provides no matching or public funds to any candidates." *Id.*

Finally, the district court held that the restriction on the expenditure of carryover campaign funds could not be justified under *Buckley*. Pet. App. A-30 to A-33. The requirements that candidates "spend-down" their campaign funds, rather than carrying them forward for use in a subsequent election, "limit political speech by telling a candidate *when* he or she must speak." *Id.* at A-32 (emphasis in original). The spend-down limits "do nothing to further the goal of preventing corruption." *Id.* at A-33. Even if limiting the power of incumbency was a compelling interest under *Buckley*, the district court found that the Missouri statute "is not narrowly tailored to serve that interest." *Id.* The state's interest in " 'equaliz[ing]' the spending power of the rich and poor" was not compelling under *Buckley*. *Id.*

3. The court of appeals affirmed the judgment of the district court and held that all three spending limits violate the First Amendment. Pet. App. A-3, A-16.

a. The court of appeals held that the limits imposed by Senate Bill 650 on candidates' total campaign expenditures "are not voluntary." *Id.* at A-7. The two "penalties" imposed on candidates who do not agree to abide by the spending limits "make the limits coercive, not voluntary." *Id.* Missouri's argument that the state simply offered an "incentive" to comply with the expendi-

ture limits was "disingenuous." *Id.* at A-8. The court of appeals found that this "coercive" statute " 'impose[s] direct and substantial restraints on the quantity of political speech,' " which is " 'at the core of First Amendment freedoms.' " *Id.* (citations omitted). This statute could be upheld only " 'if the state can show that it is narrowly drawn to serve a compelling state interest.' " *Id.* (citations omitted). Missouri "failed to meet its burden." *Id.* at A-9.

Although "the state's interest in reducing corruption" was "compelling," Missouri "has failed to explain how the campaign spending limits here in question are narrowly tailored to serve this interest or address these concerns." *Id.* The state's interest in "maintaining individual participation" was in reality an effort to level the playing field, and the court of appeals recognized that under *Buckley* "government may not 'restrict the speech of some elements of our society in order to enhance the relative voice of others.' " *Id.* (*quoting Buckley,* 424 U.S. at 48-49). With regard to "the state's interest in keeping down" election costs, the court of appeals recognized *Buckley's* explicit holding that this interest did not justify limits on "the quantity of campaign spending." *Id.* at A-10 (*quoting Buckley,* 424 U.S. at 57). Missouri, "having failed to show that the expenditure limits . . . are narrowly drawn to serve a compelling state interest," had not justified the "substantial burden" that it places on political speech. *Id.*

b. The court of appeals affirmed the district court's holding that "the spend-down provision imposes a substantial burden on political speech." Pet. App. A-13. The restriction on the expenditure of carryover funds, whether characterized as a requirement that a candidate "speak in the current election" or as a limit on "the quantity of a candidate's speech in future elections," implicated First Amendment rights and was subject to strict scrutiny. *Id.* at A-13 to A-14. Even assuming that some

of the state's interests were compelling, the state had not shown that the spend-down provision was narrowly tailored. With respect to one set of potentially compelling state interests, the court of appeals found that Missouri had "failed to demonstrate that the spend-down provision is narrowly tailored to do either of the things that the state asserts it will do." *Id.* at A-15. With respect to another potentially compelling state interest, the court of appeals found that "the state's arguments are broad and conclusory" and that Missouri "makes no attempt to show how the spend-down provision is narrowly tailored to serve that interest." *Id.*

c. The court of appeals noted that the state had raised an objection to the district court's jurisdiction to consider the question whether Proposition A's campaign contribution limits could be applied to limit candidates' personal expenditures in support of their own campaigns. Pet. App. A-4. Instead of considering the state's jurisdictional point, the court of appeals affirmed the district court's judgment on the basis of its holding in *Carver v. Nixon,* a companion case, that "the Proposition A contribution limits are unconstitutional on their face." *Id.* (citation omitted). The court of appeals held that "those limits necessarily are unconstitutional as applied to candidates as well as to other contributors." *Id.*

4. The petitioners sought review of the court of appeals' judgments that the limits on total campaign expenditures and on carryover expenditures violate the First Amendment, but they did not seek review of the judgment that the limits on candidates' personal expenditures violate the First Amendment. *See* Pet. i (statement of two questions presented); Pet. App. A-41 to A-46 (statutory appendix omits provisions that limit candidates' personal campaign expenditures).

REASONS FOR DENYING THE WRIT

Petitioners have not presented any question that warrants this Court's review. This case involves nothing more than a straightforward application of the well-settled rule that laws burdening political speech are subject to strict scrutiny. Petitioners' contention that the judgment of the court of appeals will inhibit state efforts to regulate campaign finance is wide of the mark. The court of appeals simply required Missouri to make some showing that limits on candidates' campaign expenditures are narrowly tailored to serve a compelling state interest. Missouri, however, did not justify the substantial burdens imposed on candidates' political speech.

1. Petitioners have not suggested any compelling reason why this Court should review the application of basic First Amendment principles. State laws limiting campaign expenditures, like other state laws limiting political speech at the core of the electoral process, are subject to strict scrutiny. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655, 657 (1990); *Buckley v. Valeo*, 424 U.S. 1, 14-23, 39-59 (1976) (*per curiam*); *see McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1511, 1519 (1995) ("exacting scrutiny"). The court of appeals applied the correct legal standard. It found that limits on candidates' total campaign expenditures and on the expenditure of carryover campaign funds violate the First Amendment because the state had "not demonstrated that these provisions are narrowly tailored to serve a compelling government interest." Pet. App. A-16.

The court of appeals' judgment does not present any important question about First Amendment limits on candidates' political expenditures. Missouri's limits on total campaign expenditures and on candidates' expenditure of personal funds are directly analogous to two spending limits held unconstitutional in *Buckley*. *See* 424 U.S. at 51-59. The determination that limits on the expenditure of carryover funds burden political speech and are

subject to strict scrutiny is consistent with the judgment of the only other court that has addressed an analogous spending limit.[3]

2. Missouri does not argue that strict scrutiny is the wrong constitutional standard. Missouri does not argue that the court of appeals erred in holding that the state failed to make any showing that the limits on candidates' total campaign expenditures are narrowly tailored to achieve a compelling government interest. The state, instead, attempts to draw an analogy between its campaign expenditures limits and public financing programs. *See* Pet. 5-17. The state, however, fails to note that both courts below addressed and rejected this purported analogy. Pet. App. A-6 to A-8 (court of appeals); A-27 to A-29 (district court).

The state asserts that it has established a program of "voluntary expenditure ceilings" and that different restrictions on contributions and different disclosure requirements create an "incentive" to accept spending limits. Pet. 4, 5-8. This description of the Missouri statute is not consistent with the findings of both courts below that the statute is "coercive" and not voluntary. Pet. App.

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[3] A district court held that a California limit on the expenditure of carryover funds restricted the quantity of political speech and was invalid under *Buckley*. *Service Employees International Union v. Fair Political Practices Commission*, 721 F. Supp. 1172, 1175-1179 (E.D. Cal. 1989), *aff'd*, 955 F.2d 1312 (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992). The district court held that the State of California did not have any interest sufficiently compelling to justify restrictions on the expenditure of carryover funds. 721 F. Supp. at 1175-1179. Although California did not appeal from this judgment, the court of appeals, in passing on a limited appeal by another party, affirmed the district court's judgment. The court of appeals left no doubt that restrictions on the expenditure of carryover funds are not valid unless the state can demonstrate that the burdens that it has imposed on political speech are "narrowly tailored to serve a compelling state interest." *Service Employees International Union v. Fair Political Practices Commission*, 955 F.2d at 1323 (*quoting Austin v. Michigan Chamber of Commerce*, 494 U.S. at 657).

A-7, A-8 (court of appeals), A-28 (district court). The state does not address the court of appeals' finding that its "incentive" argument is "disingenuous." Pet. App. A-8.

There is no analogy between the Missouri statute and the laws of other states, cited by Missouri, that restrict campaign expenditures as a condition of public financing.[4] *See* Pet. 9-17. The court of appeals rejected Missouri's argument that its spending limits are voluntary, and, consequently, the state's contention that the decision of the court of appeals "chills" the efforts of other states to establish "voluntary expenditure ceilings" is misplaced. *See* Pet. 17.

3. The court of appeals' judgment that Proposition A's spend-down provision violates the First Amendment does not rest, contrary to Missouri's assertion, on any "right of candidates to determine unilaterally what they may do with contributors' funds." *See* Pet. 17. Missouri does not cite anything in the opinion of the court of appeals that supports this assertion. *See* Pet. 19-25. The court of appeals actually held that the spend-down provision "restrict[s] expression protected by the First Amendment" and that the state did not demonstrate that it is "narrowly tailored to serve a compelling government interest." Pet. App. A-16; A-14 to A-16.

Missouri does not deny that strict scrutiny is the correct constitutional standard to protect political speech. The state, instead, suggests that the court of appeals' judgment is not consistent with this Court's decisions.

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[4] Similarly, there is no analogy between Missouri's limits on candidates' total campaign expenditures and state laws that prohibit candidates "from spending campaign contributions on particular items, and restricting cash expenditures above specified amounts." *See* Pet. at 9 (footnote omitted). Missouri has other statutes that limit the purpose of campaign expenditures and that limit the amount of cash expenditures, and these laws are not at issue here. *See, e.g.*, R.S.Mo. § 130.031.2 (expenditures of more than $50 must be by check), § 130.034 (allowable uses of campaign contributions).

The state's suggestion that the court of appeals misapplied this Court's decision in *Buckley* to invalidate Proposition A's spend-down requirement is mistaken. *See* Pet. 18-19. The court of appeals did not cite or discuss *Buckley* in the course of deciding that the restrictions on the expenditure of carryover funds were not narrowly tailored to serve a compelling government interest. Pet. App. A-12 to A-16. The state's contention that the court of appeals' judgment is "inconsistent with this Court's earlier denial of certiorari to review a similar Florida statute" is also mistaken. Pet. 19. A denial of certiorari is not a decision on the merits. *E.g., Teague v. Lane*, 489 U.S. 288, 296 (1989).

Missouri's argument that invalidation of Proposition A's restriction on the expenditure of carryover funds threatens the laws of many other states is overstated. *See* Pet. 20-25. There is no obvious analogy between many of the statutes that Missouri suggests are threatened by the court of appeals' judgment and Proposition A's spend-down provision. For example, the invalidatior of a restriction on the expenditure of carryover campaign funds does not seem to raise any doubt, contrary to the state's assertion, about "the constitutionality of statutes . . . that prohibit candidates from converting contributors' funds to personal use." Pet. 23-24. Even in Missouri, the effect of the court of appeals' judgment is quite limited. Although Proposition A's limits on candidates' expenditure of carryover funds have been held unconstitutional, Senate Bill 650 also imposes limits on the expenditure of carryover funds and those limits remain in effect. R.S. Mo. § 130.038; *see* Pet. App. A-12, n.5 (the court of appeals recognized that Senate Bill 650's limits on carryover funds were not at issue).

4. Finally, the record does not support Missouri's contention that the court of appeals imposed an "evidentiary requirement" that can be satisfied only by "legislative histories." Pet. 26. There is not one word in the opinion of the court of appeals that supports this contention. Missouri, nonetheless, argues that "[w]ithout saying so

explicitly, the court of appeals affirmed and endorsed the district court's view" that such evidence is required. Pet. 26-27. The district court, however, never adopted any such "view." Pet. App. A-22 ("[t]he Court does not agree . . . that . . . specific, historical factual proof" like legislative history or testimony about the electorate's intent is required). In these circumstances, any inference that the court of appeals imposed a novel evidentiary requirement is, at best, strained.

Similarly, the record does not support Missouri's argument that the court of appeals established a "new standard of review" because it " 'disagreed' " with the state's "conclusions" and did not "discuss the [state's] voluminous evidence." Pet. 26. The district court decided the case on cross motions for summary judgment, and there was no evidence, voluminous or otherwise, to be considered on the appeal. *See* Pet. App. A-17. The state did not present any evidence on its initial motion, but it did attach "exhibits" to a subsequent brief. Pet. App. A-22. The district court found that these "exhibits do nothing to prove or disprove either defendants' or plaintiffs' case" and concluded that there were "no genuine disputes of material fact." *Id.* at A-22, A-37.

The state, as the court of appeals found, did not make any argument in the district court that its "exhibits" created a genuine issue of material fact, and it agreed that the case should be decided on the cross motions for summary judgment. *Id.* at A-3. Missouri's contention that the court of appeals improperly ignored its "voluminous evidence" is at bottom an argument that summary judgment should not have been granted because its exhibits created a genuine issue of material fact. The court of appeals, however, expressly found that the state had "waived this issue" by failing to present it to the district court and that "[i]n any event, we are satisfied that no genuine issues of material fact remain in dispute." *Id.*

In short, the court of appeals did not impose any novel evidentiary requirement, and it did not establish

any "new standard of review." Instead, it required Missouri to respect First Amendment interests in political speech by making some showing that limits on candidates' campaign spending are narrowly tailored to serve a compelling government interest. The court of appeals applied this well-settled rule and found that "the state has failed to meet its burden." Pet. App. A-9; A-16.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 19, 1996

APPENDIX

APPENDIX

APPENDIX

STATUTORY PROVISIONS INVOLVED

Section 130.011(12)(a) Revised Statutes of Missouri (1994):

. . . "Contribution" includes, but is not limited to:

(a) A candidate's own money or property used in support of his candidacy other than expense of his food, lodging, travel, and payment of any fee necessary to the filing for public office;

Section 130.032.1 Revised Statutes of Missouri (1994):

In addition to the limitations imposed pursuant to sections 130.031 and 130.052, the amount of contributions made by or accepted from any person in any one election shall not exceed the following:

(1) To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor or attorney general, one thousand dollars;

(2) To elect an individual to the office of state senator, five hundred dollars;

(3) To elect an individual to the office of state representative, two hundred fifty dollars;

(4) To elect an individual to any other office, if the population of the electoral district, ward, or other unit according to the latest decennial census is under one hundred thousand, two hundred fifty dollars;

(5) To elect an individual to any other office, if the population of the electoral district, ward, or other unit according to the latest decennial census is at least one hundred thousand but less than two hundred fifty thousand, five hundred dollars; and

(6) To elect an individual to any other office, if the population of the electoral district, ward, or other unit

according to the latest decennial census is at least two hundred fifty thousand, one thousand dollars.

Section 130.038 Revised Statutes of Missouri (1994):

Within one hundred twenty days following the general election to fill the office for which the candidate has filed or declared, such candidate elected and any unsuccessful candidate shall dispose of any balance of campaign funds received after January 1, 1995 over expenses incurred for the campaign, except for a net cash balance not to exceed tweny-five percent of the campaign expenditure limit for the election cycle or seven hundred fifty thousand dollars, whichever is less, for each candidate for the office of governor; twenty-five percent of the campaign expenditure limit for the election cycle or three hundred seventy-five thousand dollars, whichever is less, for each candidate for all other statewide elected offices; twenty-five percent of the campaign expenditure limit for the election cycle or fifty thousand dollars, whichever is less, for each candidate for the senate; twenty-five percent of the campaign expenditure limit for the election cycle or fifteen thousand dollars, whichever is less, for each candidate for the house of representatives*; twenty-five percent of the campaign expenditure limit for the election cycle or fifteen thousand dollars, whichever is less, for any office of an electoral district, ward or other unit if the population of such electoral district, ward or other unit according to the latest decennial census is under one hundred thousand in population; twenty-five percent of the campaign expenditure limit for the election cycle or fifty thousand dollars, whichever is less, for an office of an electoral district, ward or other unit if the population of such electoral district, ward or other unit according to the latest decennial census is at least one hundred thousand but less than two hundred fifty thousand in population; and twenty-five percent of the campaign expenditure limit for the elec-

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* *Words "of representatives" not in original rolls.*

tion cycle or two hundred fifty thousand dollars, whichever is less, for an office of an electoral district, ward or other unit if the population of such electoral district, ward or other unit according to the latest decennial census is at least two hundred fifty thousand in population. Any balance on hand on January 1, 1995, shall not be included under this subsection if reported as provided in subsection 7 of section 130.032.

Section 130.100 Revised Statutes of Missouri (Supp. 1995):

Contribution limits: There shall be the following limitations on campaign contributions:

(1) No person or committee shall make a contribution to any one candidate or candidate committee with an aggregate value in excess of:

(a) $100 per election cycle per candidate in districts with fewer than 100,000 residents;

(2) $200 per election cycle per candidate, other than statewide candidates, in districts of 100,000 or more residents. For purposes of this section "statewide candidates" refers to those candidates seeking election to the office of Governor, Lieutenant Governor, Attorney General, Auditor, Treasurer and Secretary of State.

(3) $300 per election cycle per statewide candidate.

(2) No person, entity or committee shall make a contribution to any other persons, entities or committees for the purpose of contributing to a specific candidate which when added together or when added together with contributions made directly to the candidate or to the candidate's committee, will have an aggregate value in excess of the limits stated in section 1.*

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* Probably refers to subdivision (1) of this section.

(3) No candidate or candidate committee shall solicit or accept any contribution with an aggregate value in excess of the limits stated in this section.

(4) For purposes of this section, the term "candidate" shall include the candidate, the candidate's treasurer, and the candidate's committee and any contribution to the candidate's treasurer or candidate committee shall be deemed a contribution to the candidate.

Supreme Court, U.S.
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No. 95-1524

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

Jeremiah W. (Jay) Nixon, Attorney General of Missouri, and John Maupin, Chairman, Missouri Ethics Commission, *Petitioners*,

v.

Shrink Missouri Government PAC, a political action committee, W. Bevis Schock and Fredrick T. Dyer, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

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Nixon v. Carver, No. 95-1258 (cert. pending) 1-4

Statutes:

Rev. Stat. Mo. 130.038 1

Other Authorities:

Senate Bill 650 . . . . . 1, 2

REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT

The respondents' opposition to the petition for writ of certiorari has two principal flaws. First, by focusing this Court's attention on the immediate impacts of the court of appeals ruling, the respondents attempt to persuade this Court that the breadth of the court of appeals holdings can be ignored. But it cannot. The holdings of the Eighth Circuit do not just invalidate a particular law, they eliminate entire avenues of campaign finance reform. Second, by omitting any reference to the related cases now before this Court, the respondents implicitly suggest that the decision of the court of appeals in this case can necessarily be affirmed even if this Court revisits its holdings in *Buckley v. Valeo*.[1] But again, it cannot. The issues raised by the holdings of the court of appeals in this case are based in large part on aspects of *Buckley* that are fundamental to the questions raised by the parties in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*[2] and *Nixon v. Carver*.[3]

1. How crabbed a reading the respondents give to the court of appeals' decision is most clearly shown by their disingenuous reference to the limit on carrying over campaign funds that was enacted as part of Senate Bill 650, codified at Rev. Stat. Mo. 130.038. The respondents claim that those "limits on the expenditure of carryover funds . . . remain in effect."[4] That may be true in theory, for the respondents did not actually challenge the higher carryover

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[1] 424 U.S. 1 (1976).

[2] No. 95-489, *cert. granted*, 116 S.Ct. 689 (1996).

[3] No. 95-1258, *cert. pending*.

[4] Respondents' Brief in Opposition ("Opp.") at 11.

limits contained in the alternative provision. And if the court of appeals had dealt with the carryover provisions as it did with the contribution limits at issue in *Nixon v. Carver*, there might be some logical basis to the respondents' assertion as well. But there is no basis for that claim here.

In *Carver*, the court of appeals relied on the amount of the contribution limit in its analysis of the limit's constitutionality. But the court of appeals did not even mention the amount of the carryover limit in its decision. Instead it affirmed the district court's holding that a carryover restriction -- *any* carryover restriction -- "imposes a substantial burden on political speech by requiring that funds raised during a particular campaign be spent during the campaign." A-13. There is no room in the Eighth Circuit for any carryover restriction, much less for the Senate Bill 650 limit that the respondents claim is still in effect. In fact, the Eighth Circuit's holding effectively enshrines a candidate's asserted right to use contributions for any political purpose -- regardless of the wishes of those who made the contributions. It expressly creates a right to *decline* to use those contributions to speak.

The respondents' characterization of the Eighth Circuit's decision as to Missouri's voluntary expenditure ceilings implicitly emphasizes the essence of that holding: that states cannot differentiate, even as to clearly constitutional requirements such as mandatory disclosure, between those who will and those who will not abide by reasonable ceilings. The Eighth Circuit and the respondents maintain that ceilings can exist only where public funds are available for campaigns. That dramatic expansion of *Buckley* requires additional judicial analysis and, if it is to be accepted, both clarification and endorsement by this Court. Without that clarity and authority, Missouri and

other states in the Eighth Circuit will be precluded, and all other states and Congress will be discouraged from using any such innovative tool to attack the ills of campaign finance in the 1990's and beyond.

2. Even the respondents recognize that in *Buckley* this Court erected an analytical fence between restrictions on contributions and restrictions on expenditures, including independent expenditures. The parties disagree as to the height of the fence -- one of the issues squarely presented to this Court in *Carver*. But the critical difference in this case, as in *Colorado Republican*, is not the height of the fence. Rather, it is the location of the fence line -- the line that defines, when considered along with the level of scrutiny, whether a particular campaign finance reform is permissible or impermissible. Throughout their opposition brief, the respondents assume that the line followed by the fence is readily apparent, making it easy to decide whether particular laws fall on one side or the other. *Colorado Republican* disproves that assumption.[5] In deciding that case, this Court will necessarily blow away at least some of the fog that now obscures part of the fence. The respondents do not and cannot explain how that clarity can help but affect this case, in which the court of appeals was required to peer through the fog to see where the fence goes as it crosses the field where states are trying to prevent candidates from using money *not* to speak. They ignore the hope for clarity as to whether the fence prevents the states, merely by increasing disclosure requirements or by precluding corporate and comparable contributions, from encouraging rational limits on spiraling campaign costs.

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[5] *See Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 59 F.3d at 1015, 1024 (10th Cir. 1995).

This Court should consider this case in order to extend the view that voters and legislators anticipate will come from a decision in *Colorado Republican*.

In addition to seeking clarity as to the line between contributions and expenditures, both *Colorado Republican* and *Nixon v. Carver* raise another fundamental issue. Both ask, *Colorado Republic* implicitly and *Carver* explicitly, what kind of evidence is required to defeat an attack on a state's campaign reform efforts, and the propriety of relying on the studied opinion of the true experts in the field: voters and politicians. For example, the Tenth Circuit in *Colorado Republican* referred to the members of Congress who enacted the law as "surviving veterans of the election campaign process," persons who "should be considered uniquely qualified to evaluate" the ills being addressed in campaign finance reform.[6] The court then largely deferred to the decisions of those experts. On the other hand, the Eighth Circuit in this case ignored the expert views of those who had themselves run for office -- just as in *Carver* it ignored the views of the very voters whose perception of corruption justifies the imposition of contribution limits. The respondents do not recognize the inconsistency of the Eighth and Tenth Circuit's approaches, nor do they see the impact on this case of any declaration by this Court in response to those approaches.

The Eighth Circuit's decision to demand some unspecified kind of additional evidence should not be summarily accepted. Rather, the hundreds of legislators and hundreds of thousands of voters now considering additional attacks on campaign finance problems should be given the guidance they require as to the law that will apply

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[6] *Colorado Republican*, 59 F.3d at 1015.

to their reforms, the standards that will apply in deciding suits to challenge those reforms, and the kind of legislative record that they must compile to successfully defend against those challenges.

CONCLUSION

For the reasons stated in the Petition and further explained above, this Court should grant the petition for writ of certiorari.

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